85-379 (1)

No. -

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1985

OHIO NEW AND REBUILT PARTS, INC. and/or MEL'S BATTERY, INC., CANTON HEALTH CARE CENTER, INC. and COLONIAL GARDENS CARE CENTER, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Civil Service Reform Act of 1978, 5 U.S.C. Sec. 2301, et seq., by virtue of those provisions known as the "Senior Executive Service," 5 U.S.C. Sec. 3131, et seq, on its face, or as applied to Regional Directors of the National Labor Relations Board, violate the Due Process and Equal Protection Guarantees of the Fifth Amendment to the United States Constitution, by injecting substantial personal, financial interests, and other irrelevant and impermissible interests, into the administrative and enforcement processes engaged in by the United States of America through the National Labor Relations Board, by linking the pay of Regional Directors to their performance of both "quasi-judicial"

and "administrative prosecutorial" functions in their administration of the National Labor Relations Act, 29 U.S.C. Sec. 151, et seq.

2. Did the United States Court of Appeals for the Sixth Circuit, in a case of first impression among the United States Courts of Appeals, err in upholding the constitutionality of the Senior Executive Service, where no factual record existed before the Court of Appeals concerning the Senior Executive Service, because the National Labor Relations Board refused the Petitioners an opportunity to develop a record concerning the unconstitutionality of the Senior Executive Service.

PARTIES

The Parties to this matter in the United States Court of Appeals for the Sixth Circuit were:

(1) Ohio New and Rebuilt Parts, Inc. and/or Mel's Battery, Inc.;

(2) Canton Health Care Center, Inc.*;

(3) Colonial Gardens Care Center, Inc.*;

(4) The National Labor Relations Board.

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*Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, please be advised that the parent company of these corporations is American Health Care Centers, Inc., 661 Weber Drive, Wadsworth, Ohio 44281.

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OPINIONS BELOW

Citations to the opinions regarding this matter delivered by the United States Court of Appeals for the Sixth Circuit and the National Labor Relations Board are:

(1) N.L.R.B. v. Ohio New and Rebuilt Parts, Inc., et al., 760 F.2d 1443 (6th Cir. 1985);
2) Ohio New & Rebuilt Parts, Inc. and Mel's Battery, Inc., 267 NLRB No. 66, 114 LRRM 1053(1983)
3) Canton Health Care Center, Inc., 269 NLRB No. 35, 115 LRRM 1279(1984);
4) Colonial Gardens Care Center, Inc., 268 NLRB No. 279, 115 LRRM 1078(1984).

JURISDICTIONAL STATEMENT

Judgment was entered in this matter by the United States Court of Appeals for the Sixth Circuit on April 30, 1985.

The jurisdiction of the United States Supreme Court to review the judgment of the United States Court of Appeals for the Sixth Circuit by writ of certiorari is

conferred by 28 U.S.C. Sec. 1254 (1) and 29 U.S.C. Sec. 160(e).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THIS MATTER

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall ...be deprived of life, liberty, or property, without due process of law ....

The pertinent provisions of the Civil Service Reform Act of 1978, 5 U.S.C Sec. 2301, et seq., termed "the Senior Executive Service," 5 U.S.C.Sec. 3131 et seq., the National Labor Relations Act, 29 U.S.C. Sec. 151 et seq., and the Rules and Regulations of The National Labor Relations Board, 29 C.F.R. Sec. 101.2 et seq., are set forth in the Appendix hereto.

STATEMENT OF THE CASE

This Petition concerns three separate proceedings before the National Labor

Relations Board ("N.L.R.B." or "Board") which were consolidated before the Court of Appeals.

The N.L.R.B. obtained enforcement from the Court below of three individual Orders directing the respective employers in each Board proceeding (collectively referred to in this Petition as the "Petitioners") to bargain with a labor organization, and directing other affirmative relief.[1]

Each of the N.L.R.B. proceedings involved a "Representation Case," followed by an "Unfair Labor Practice Case."[2]

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[1]Jurisdiction was conferred upon the Court of Appeals by 29 U.S.C. Sec. 160(e) and(f).

[2]Essentially, in each proceeding a labor organization filed a petition under 29 U.S.C. Sec. 159 (c)(1)(A)(i) and 29 C.F.R. Sec. 101.7 and 102.60(a), seeking an election to determine whether certain employees of the respective Petitioners desired the labor organization as their collective bargaining agent (referred to in this Petition generally as a "Representation

The C.S.R.A.

The C.S.R.A. became effective on

(footnote continued from previous page)

proceeding").

In each of the Representation proceedings the Regional Director for Region 8 of the N.L.R.B. (the "Regional Director") processed the petition, conducted the election, and certified the respective labor organization as having won the election, following some post-election proceedings.

Thereafter, each proceeding involved an Unfair Labor Practice Charge filed by the respective certified labor organization under 29 U.S.C. Sec. 160(a) and 29 C.F.R. Sec. 101.2 and 102.11, alleging, inter alia, that the respective Petitioner was refusing to bargain with the labor organization (referred to in this Petition generally as an "Unfair Labor Practice proceeding").

In each of the Unfair Labor Practice proceedings the Regional Director issued a Complaint, pursuant to 29 U.S.C. Sec. 160(b) and 29 C.F.R. Sec. 101.8 and 102.25, which subsequently was found by the Board to be meritorious, resulting in the issuance of an Order (in one proceeding following a hearing before an Administrative Law Judge, and in the other two proceedings following a Motion for Summary Judgment filed by the Regional Director) requiring, inter alia, that the respective Petitioner bargain with the respective labor organization.

October 13, 1978, and was passed by the Congress by a majority of 385 to 10 in the House of Representatives and by a majority of 87 to 1 in the U.S. Senate. (S. Res. 2640, 95th Cong., 2d Sess., 124 Cong. Rec. 134 (1978); H.R. Res. 11280, 95th Cong., 2d Sess., 124 Cong. Rec. 142 (1978).

As stated by Dr. Alan K. Campbell, the former director of the Office of Personnel Management at the time of its enactment, "the [C.S.R.A.] replaces an ineffective inflexible system which had existed for nearly 100 years." ("Statement of Dr. Alan K. Campbell, Director, U.S. Office of Personnel Management Concerning Limitations on Permanent Bonuses for Members of the Senior Executive Service" dated June 18, 1980 (the "June 18 Campbell Statement")).

The C.S.R.A. was enacted by the Congress as "an important step toward making the Government ... more accountable

to the American People." (Senate Report No. 94-969, 1978 U.S. Code Cong. & Ad. News 2726).

THE S.E.S.

The Senior Executive Service, 5 U.S.C. Sec. 3131, et seq., became effective on July 13, 1979.

As reported by the Office of Personnel Management in a news release dated July 22, 1980, "President [Carter] called the [S.E.S.] the cornerstone of his civil service reform efforts."

As stated by Dr. Campbell, the objective of the S.E.S. is "to link pay to performance, the proven and effective practice followed in the private sector." (June 18 Campbell Statement, supra.).

THE COMPENSATION SCHEME OF THE S.E.S.

The S.E.S. is a system of compensation, including base pay, awards and bonuses, for which certain high ranking positions within

the N.L.R.B., as well as similar positions in most Federal agencies, are eligible, with certain exceptions. Most notable among the exceptions to coverage of the S.E.S. are all members of the Judicial Branch of the government and all Administrative Law Judge positions within any of the Federal agencies covered. (5 U.S.C. Sec. 3132).

The S.E.S. is available for all positions within an agency above GS-15 of the General Schedule and below Level III of the Executive Schedule, or their equivalents, in which an employee exercises important policy-making or executive functions. (5 U.S.C. Sec. 5381 and 3132 (a)) (The persons occupying such positions are referred to in this Petition as "Senior Executives").

The positions within the N.L.R.B. covered by the S.E.S. include, among others, the Regional Directors for the 33

regions of the N.L.R.B. (5 U.S.C. Sec. 5381 and 3132(a); 45 Fed. Reg. 3797 (1980)).

The core of the S.E.S. is a scheme for compensating Senior Executives by various types of awards. These awards, which are provided for in 5 U.S.C. Sec. 5384 and 4507 are "Performance," "Meritorious Executive" and "Distinguished Executive" Awards, respectively.

The "Performance Awards," which are awarded on an annual basis in amounts of up to 20% of a Senior Executive's base pay, are the mainstay of the S.E.S. system. (5 U.S.C. Sec. 5384).

Although at the time of enactment of the S.E.S. each Agency was permitted to grant a "Performance Award" to 50% of its eligible Senior Executives each year, the percentage of Senior Executives eligible for a "Performance Award" within each

Agency was reduced from 50% to 25% for the fiscal year of the U.S.A. ended September 30, 1981, from 25% to 20% through fiscal year 1983, and back to 50% for fiscal year 1984. (5 U.S.C. Sec. 5383).

"Meritorious Executive" Awards in the amount of $10,000.00 may be awarded to up to 5% of the Senior Executives during any fiscal year of the United States for "sustained accomplishment." (5 U.S.C. Sec. 4507).

"Distinguished Executive" Awards in the amount of $20,000.00 may be awarded to up to 1% of the Senior Executives during any fiscal year of the United States for "sustained extraordinary accomplishment." (5 U.S.C. Sec. 4507).

Each Agency's awards are given on the basis of annual evaluations conducted by "Performance Review Boards" ("P.R.B.") established within the Agency to measure

the individual performance of the Senior Executives and that of the organizations they direct. (5 U.S.C. Sec. 4312 and 5384).

Each P.R.B. is responsible for adopting the statutory standards of evaluation for performance appraisals set forth in 5 U.S.C. Sec. 4313 to the particular Senior Executive positions evaluated in its Agency.

The combined maximum compensation available to any Senior Executive as a result of base pay, "Performance Awards," and other awards made available by the S.E.S., is $82,900.00. (5 U.S.C. Sec. 5318).

THE APPLICATION OF THE S.E.S. TO REGIONAL DIRECTORS

The key to an understanding of how a Regional Director acquires a financial interest in the manner in which he or she processes Representation proceedings and Unfair Labor Practice proceedings lies in

perceiving the inextricable relationship between (1) the amounts of awards over and above base pay which are available to the Regional Director under the S.E.S. and (2) the system applied by the P.R.B. within the N.L.R.B. for rating the performance of each Regional Director.

As noted above, "Performance Awards" may be given annually to 50% of the Senior Executives in each Agency, including Regional Directors, in amounts up to 20% of their base salary. In addition, each year up to 5% of the Senior Executives, including Regional Directors, may receive either the $10,000 Award of "Meritorious Executive", or up to 1% of the Senior Executives, including Regional Directors, may receive the $20,000 "Distinguished Executive" Award.

Five statutory "Performance Criteria" under the S.E.S. establish the basis upon which the P.R.B. within the N.L.R.B.

evaluates a Regional Director's performance. These criteria, as set forth in 5 U.S.C. Sec. 4313, include the following:

(1) Improvements in efficiency, productivity and work quality;

(2) Cost efficiency;

(3) Timeliness of performance;

(4) Success in meeting affirmative action goals; and

(5) Indications of the effectiveness, productivity and performance quality of the employees for whom the Senior Executive is responsible.

The crucial system applied by the P.R.B. within the N.L.R.B. for rating the performance of Regional Directors originally arose out of a May 14, 1979 Memorandum to the Regional Directors from John S. Irving, Esq., the General Counsel of the N.L.R.B. at the time of the passage of the S.E.S. (the "May 14 Irving Memorandum"), a copy of which appears in the Appendix.

In seeking to effectuate the statutory

"Performance Criteria," the May 14 Irving Memorandum called for rating the performance of Regional Directors on the basis of a "100 points maximum, plus 14 bonus points" system measured against certain critical elements of performance:[3]

(a) "Effectiveness and Efficiency of Performance";

(b) "Quality of Casehandling";

(c) "Achievement of Agency Programs and Objectives";

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[3]Although the N.L.R.B. Performance Criteria have been modified such that each of the critical elements of performance - which were assigned disproportionate percentages of a total of 100 points, with the possibility of bonus points under the system as originated - are now equally weighted at 25 points each, with no "bonus points" allowed, the elements of each of the criteria enumerated above have remained the same. See, Memorandum of William A. Lubbers, General Counsel, to all Regional Directors, dated April 13, 1982; Memorandum of William A. Lubbers, General Counsel, to all Regional Directors, dated February 20, 1981 (Appendix B to Sixth Circuit Opinion); Memorandum of John H. Fanning, Chairman to William A. Lubbers, General Counsel, dated February 13, 1981, copies of which are included in the Appendix.

(d) "Staff Relations including Developing and Training of Subordinates".

ARGUMENT

POINT I. SPECIAL AND IMPORTANT REASONS EXIST FOR GRANTING A WRIT OF CERTIORARI SINCE THE SENIOR EXECUTIVE SERVICE AFFECTS THE ENTIRE NATION

The Petitioner's urge that a Writ of Certiorari issue because special and important reasons implore certiorari.

As observed by the Sixth Circuit, "The constitutionality of the Senior Executive Service appears to be a question of first impression among the Courts of Appeal" (Slip Opinion, Page 14, App. 14).

As the Sixth Circuit further quoted from the Senate Report on the C.S.R.A., the S.E.S. controls the management of "the men and women who administer the programs that affect every person in the Nation." (Emphasis Added) (Slip Opinion, Page 6, App. 6).

Simply stated, the special and important quality of this case is that the

Petitioners are challenging the constitutionality of a statute which links the pay of all of the Regional Directors of the N.L.R.B. to the decisions they make every day, thereby affecting virtually every employer and labor organization in the Nation, as well as a vast proportion of the public.

Because the S.E.S. mandates the compensation not only for Regional Directors of the N.L.R.B., but for all Federal Managers who perform "quasi-judicial" and "administrative prosecutorial" functions, the reach of this Petition incidentally pervades the daily operations of the entire Executive Branch of the United States Government.

Thus, the possible temptation of bias created by the S.E.S. compensation scheme does not end with the Regional Directors of the Board; it broadly applies to nearly

8,000 of the highest-ranking Federal Managers, including all who are charged with the sensitive responsibility of overseeing proceedings in every Federal regulatory agency in the country.

Whereas this Court has seen fit before to accept other landmark cases in the realm of potential taint of official behavior, and indeed has noted in each case the paramount importance of protecting the public against unconstitutional risk of bias, none of the proceedings under scrutiny in those cases affected anywhere near the number of people touched by the S.E.S.

The impact of the Court's disposition of this Petition, when considered in terms of the sheer number of federal officials, or scope of federal activity, affected, proves to be unparalleled by prior Court opinions in this delicate area.

This Petition asserts a risk of bias nothing shy of a direct relationship between the pay of Regional Directors and the decisions they reach, where both "quasi-judicial" and "administrative prosecutorial" functions are being performed.

Thus, this Petition presents that very link missing in this Court's opinion in Marshall v. Jerrico, Inc., 446 U.S. 238 (1980), where the Court remarked: "It is plain that no official's salary is affected by the levels of the penalties" and "No governmental offical stands to profit economically from vigorous enforcement of the child labor provisions of the Act. The salary of the assistant regional administrator is fixed by law." 446 U.S. 238, 245, 250.

This Petition represents the first occasion, and probably the only occasion,

when this precise constitutional issue will be before this Court, since never prior to the S.E.S. was the pay of Federal Officials linked directly to their performance of "quasi-judicial" and "administrative prosecutorial" functions, and since a denial of this Petition would most certainly operate, as precedent, to deter an examination of the biasing influences of the S.E.S. in the future.

The need is compelling for this Court to render its view at this moment concerning the bounds of risk of bias, now that the pay of Regional Directors is directly tied to the rulings they make, and, in all likelihood, will remain so indefinitely.

Since 1927 the Supreme Court has endeavored, persistently and consistently, to protect against even the appearance of bias in every form of legal proceeding.

Yet, it may fairly be said that never before has the need been as urgent for this Court to safeguard its judicial standards preventing bias.

Although the eradication of bias is of great importance even in cases where a single mayor is making a few decisions impacting upon the populace of a tiny municipality (see, Tumey v. Ohio, 273 U.S. 510 (1927), Ward v. Village of Monroeville, 409 U.S. 57 (1972)), here the entire complement of Regional Directors of the Board is administering the National Labor Relations Act across the land in the face of impermissible influences, in case after case, day after day.

During the fiscal year of 1984 alone, the Board docketed 8,571 Representation Petitions and 34,855 Unfair Labor Practice Charges (118 Lab. Rel. Rep. (BNA) 122), all of which were processed in the first

instance by a Regional Director.

The "special" and "important" nature of this Petition is certain and clear, given its objective of maintaining impartiality in the official conduct of the Nation's chief promoter of "the full flow of commerce" and principal guardian of "the rights of the public in connection with labor disputes affecting commerce," 29 U.S.C. Sec 141(b).

The Petitioners by this Petition are endeavoring to protect this Court's very own standard prohibiting risk of bias in legal proceedings.

The Petitioners respectfully plead for an exercise of this Court's power of supervision over the federal courts and regulatory agencies, to review this most important application of its standards to prevent bias in "quasi-judicial" and/or "administrative prosecutorial" proceedings.

The Petitioners further submit that a denial of this Petition would result in disruptive confusion over the true content of the standard enunciated by this Court in Gibson v. Berryhill, 411 U.S. 564 (1973), since the ad hoc opinion of the Sixth Circuit ignoring that authority, rather than the well-reasoned opinions of this Court, then undoubtedly would serve - at least in proceedings before the N.L.R.B., but most probably as regards every agency of the Federal Government - as the touchstone for determining risk of bias whenever "quasi-judicial" and "administrative prosecutorial" functions are performed by Federal Officials.

POINT II. THE COURT OF APPEALS DECISION CONFLICTS WITH ALL SUPREME COURT PRECEDENT GOVERNING RISK OF BIAS

A. The Supreme Court's Standard Of Due Process In Administrative Proceedings

"The Due Process Clause entitles a

person to an impartial and disinterested tribunal ...[to prevent] unjustified or mistaken deprivations and [to promote] participation and dialogue by affected individuals in the decision-making process." Marshall v. Jerrico, Inc., supra. Accord: Schweiker v. McClure, 456 U.S. 188 (1982).

These precepts apply not only in the context of civil and criminal cases, but

> "[m]ost of the law concerning disqualification because of interest applies with equal force to ... administrative adjudicators." Gibson v. Berryhill, supra, quoting K. Davis, Administrative Law Text Sec. 12.04, p. 250 (1972).

As early as 1927, the United States Supreme Court recognized that any judicial proceeding in which a judge has a substantial pecuniary interest in the matters before him, to the extent that such interest "would offer a possible temptation to the average man sitting as a judge" to

reach a result independently of the merits of the positions presented to him, is unconstitutional. Tumey v. Ohio, supra. (Emphasis added). Accord: Ward v. Village of Monroeville, supra.

Likewise, in Gibson v. Berryhill, supra, the Court held that an administrative board of optometrists composed solely of optometrists in private practice for their own account was constitutionally disqualified from hearing "unlawful practice" charges against other optometrists who were employees of business establishments, since the result of such hearings "would possibly redound to the personal benefit of members of the [b]oard." 411 U.S. at 578. (Emphasis added). The Supreme Court in Gibson affirmed and quoted the lower court's formulation of the test for bias in administrative "quasi-judicial" proceedings:

> "the injury was not whether the [administrative board] members were actually biased but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him".

411 U.S. at 571. (Emphasis added).

Petitioners argued below that the precise governing standard is not whether the Regional Directors are actually biased in their conduct of Representation proceedings or Unfair Labor Practice proceedings by reason of the S.E.S. scheme of awards and bonuses, but whether, in the natural course of events there is an indication of a possible temptation to an average person acting as a Regional Director to process such proceedings with bias for or against any issue presented.

As the Supreme Court recently pointed out in Marshall v. Jerrico, supra, "'justice must satisfy the appearance of justice'... and this 'stringent rule may

sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties...'" 446 U.S. at 243. (Citation omitted) (Emphasis added).

The Petitioners submit that an analysis of the provisions of the S.E.S., as well as of their application to the N.L.R.B., compels the conclusion that, at the very least, the "appearance of justice" is not attained, and that, certainly, the impermissible interests provided by the S.E.S. are so substantial as to warrant a Writ of Certiorari.

B. The S.E.S. Is Unconstitutional

1. The Unconstitutional Application of the Performance Review Criteria to Representation Proceedings

According to the May 14 Irving Memorandum, in the processing of Representation Petitions, the critical elements of "Effectiveness and Efficiency

of Performance" considered are:

(a) frequency of approval of "Election Agreement";
(b) frequency of issuance of "Regional Directors Decisions Pre-Election)";
(c) the conduct of "Elections"; and
(d) the conduct of "Post-Election Proceedings".

Whether the Regional Director earns the maximum points that can be won for the various actions which may be taken with regard to a Representation petition depends upon the period of "median days" within which each such action is taken. The Regional Director earns the greatest number of points for actions taken within the least period of "median days." No points are earned where the action if taken beyond a maximum period of "median days."

It is readily apparent, then, that for the Regional Director to earn a "Performance Award," not only must certain actions with regard to Representation Petitions -- for example, issuing a

Decision and Direction of Election -- be taken, but such actions must be taken as expeditiously as possible.

The inducement to take such actions as expeditiously as possible is compounded where an Election is conducted in accordance with a Decision and Direction of Election.

Since the maximum points for issuing Decisions and Directions of Election is only available if the action is taken within a median of 45 days from the filing of a Petition, and the maximum points for conducting Elections are earned only where the "median days" period from the filing of a Petition to the date of the Election is within 50 days, and because the N.L.R.B. Case Handling Manual states in Sec. 11302.1 that a Regional Director may not conduct an Election within 25 days following a Decision and Direction of Election, a

strong inducement exists to issue a Decision and Direction of Election within a period of 24 days after the filing of a Petition.

Obviously, this inducement exists because the Regional Director is clearly interested in winning the greatest number of points available under the N.L.R.B. Performance Criteria, so that the chances of winning thousands of dollars are improved.

2. Regional Directors May "Control" Their Satisfaction of Median Goals in Representation Proceedings By Taking Particular Actions

The N.L.R.B. Performance Criteria also offer a possible temptation to Regional Directors to control the "median days" period within which Elections are conducted so that the statistical "median days" period is less than 50.

In order to achieve such a record the

Regional Director could tactically (a) issue Decisions and Directions of Elections and conduct Elections in some cases and (b) issue Decisions Dismissing Petitions in other cases -- in each case to assure obtaining points in each category of official action and to secure an overall record of satisfactory "median days".

In a case where a period of, for example, 45 days has elapsed from the filing of a Petition, the Regional Director would be tempted to issue a Decision Dismissing Petition in order to earn the maximum points for issuance of "Regional Director Decisions (Pre-Election)," rather than issue a Decision and Direction of Election and be unable thereafter, in view of the Case Handling Manual requirements, to conduct the Election within 50 days from the filing of the Petition.

Further, with regard to a case where a

period of less than 24 days has elapsed from the filing of a Petition, the Regional Director might be tempted to issue a Decision and Direction of Election in order to earn points for both issuing "Pre-election Decisions" within a "median" of 45 days and for conducting "Elections" within a "median days" period of 50 days, rather than issue a Decision Dismissing Petition and consequently earn fewer points for issuing a "Pre-Election Decision."

3. The Unconstitutional Application of the Performance Criteria to Unfair Labor Practice Proceedings

As is the case with the processing of Representation petitions, the financial interests propounded by the Performance Criteria are no less apparent when considered in the realm of Unfair Labor Practice proceedings.

In this regard, according to the May 14 Irving Memorandum, with regard to Unfair

Labor Practice Charges filed under 29 U.S.C. Sec. 160(a) and 29 C.F.R. Sec. 101.2 and 102.11, a Regional Director can earn points for issuing "Complaints," for the "Percentage of 45-day Cases Within Control," for the "Percentage of Unexcused Average Compliance Cases Within Control," and for "Settlement Agreements."

Whether a Regional Director earns the maximum points available for the various actions taken with regard to Unfair Labor Practice Charges depends upon the period of "median days" within which the respective action is taken, such that a Regional Director earns the greatest number of points where the action is taken within the least period of "median days", and no points where the action is taken beyond a maximum period of "median days".

Further, whether a Regional Director earns the maximum points available for the

various actions taken with regard to Unfair Labor Practice Charges also depends upon a "percent of merit" factor, such that a Regional Director earns the greatest number of points where the action is taken in cases where the "percent of merit" factor is the highest, and no points where the action is taken in cases where the "percent of merit" factor is below a minimum.

In order for a Regional Director to earn a "Performance Award", the Regional Director must take the various actions with regard to Unfair Labor Practice Charges - for example, must issue a Complaint - and must take the respective action as expeditiously as possible and with regard to the highest "percent of merit" factor.

4. Regional Directors May "Control" Their Satisfaction Of Median Goals In Unfair Labor Practice Proceedings By Taking Particular Actions

The inducement for a Regional Director to take the various actions with regard to Unfair Labor Practice charges is compounded, since the maximum points for "Settlement Agreements" may be earned by a Regional Director only in cases where Complaints have issued for which the Regional Director also earns the maximum points by approaching, or surpassing, the "median days" goals prescribed for each action.

In addition, the inducement for a Regional Director to take various actions with regard to Unfair Labor Practice Charges as expeditiously as possible is further compounded by the points which can be earned by a Regional Director depending upon the "Percentage of 45 day Cases Within [the Regional Director's] Control."

Since a Regional Director can earn maximum points where the "Percentage of 45-day Cases Within Control" is less than

2%, and because the percentage depends upon the "45-day Cases" within a Regional Director's control, a Regional Director has an inducement to either dismiss an Unfair Labor Practice Charge or issue a Complaint within a period of 45 days after the filing of the Unfair Labor Practice Charge.

Moreover, inasmuch as a Regional Director may earn, under the critical element of "Effectiveness and Efficiency of Performance," points for issuing "Complaints," and for "Percentage of 45-day Cases Within Control," and, in order to control the "median days" period of 45 days within which to issue Complaints, and as concerns "Percentage of 45-day Cases Within Control", the N.L.R.B. Performance Criteria presents an inducement to a Regional Director to issue Complaints in some cases and to dismiss Unfair Labor Practice Charges in other cases.

In a case where a period of, for example, more than 45 days has elapsed from the filing of an Unfair Labor Practice Charge, a Regional Director would be tempted to dismiss the Unfair Labor Practice Charge, pursuant to 29 C.F.R. Sec. 101.3 through 101.6, rather than issue a Complaint, in order to control the "median days" period 45 days within which to issue Complaints, and as concerns "Percentage of 45-day Cases Within Control."

In a case where a period of less than 45 days has elapsed from the filing of an Unfair Labor Practice Charge, a Regional Director would be tempted to issue a Complaint in order to earn the maximum points both for issuing Complaints within a "median days" period of 45 days, and maintaining less than 2% of 45-days cases within the Regional Director's control.

5. The S.E.S. Mandate That Performance Awards Be Based Upon "Improvement" Progressively Heightens The Emphasis Placed On Impermissible Inducements

The inducement for a Regional Director to take various actions with regards to Representation Petitions and Unfair Labor Practice Charges, and to take the actions as expeditiously as possible, is compounded where a Regional Director has received a "Performance Award" in a previous fiscal year of the U.S.A., since the "Performance Criteria" are defined in terms of "improvements", 5 U.S.C. Sec. 4313(1), so as to require a reduction in the respective period of "median days" in each progressive fiscal year of the U.S.A. in order for a Regional Director to merit a "Performance Award".

6. Other Actions Considered As Performance Criteria

With regard to the critical element of "Achievement of Agency Programs and

Objectives", a Regional Director can earn maximum points for support of N.L.R.B. programs, including support for the "Officer-of-the-Day Program", which is a program, that accounts, in large part, for the total quantity of Representation Petitions and of Unfair Labor Practice Charges docketed.

The element of "Achievement of Agency Programs and Objectives", including support of the "Officer-of-the-Day Program", presents an inducement to a Regional Director to docket some Representation Petitions and Unfair Labor Practice Charges, in order to control the "median days" and "percent of merit" factors of the critical element of "Effectiveness and Efficiency of Performance."

Thus, for example, the N.L.R.B. Performance Criteria present an inducement to a Regional Director to docket

Representation petitions with regard to which the N.L.R.B. lacks jurisdiction, in order that the Regional Director may dismiss the Representation Petition within a "median days" period of 45 days, so as to earn points for "Regional Director Decisions (Pre-election)."

Similarly, the N.L.R.B. Performance Criteria present an inducement to a Regional Director to docket Unfair Labor Practice Charges with regard to which, for example, the Unfair Labor Practice Charges plainly lack merit, in order that the Regional Director may dismiss the Unfair Labor Practice Charges within a "median days" period of 45 days, so as to earn points for maintaining less than 2% of 45-day cases.

7. In Order For Regional Directors to Receive S.E.S. Performance Awards Subordinates Must Be Influenced By The Same Inducements

Because the eligibility of a Regional Director for a "Performance Award" depends, in part upon "the effectiveness, productivity and performance quality of the employees for whom the (Regional Director) is responsible," and since a Hearing Officer designated by the Regional Director to conduct Hearings is an "employee for whom the [Regional Director] is responsible," the Regional Director has vested interests in the expediency with which a Hearing Officer concludes a Hearing conducted pursuant to 29 C.F.R. Sec. 102.64(a) and 101.20(c).

Because of the N.L.R.B. Performance Criteria, and because the eligibility of a Regional Director for a "Performance Award" depends similarly upon the employees for whom the Regional Director is responsible, and since the "Member of the Field Staff" designated by the Regional Director to

investigate an Unfair Labor Practice Charge is an "employee for whom the [Regional Director] is responsible", the Regional Director has vested interests in the expediency with which the "Member of the Field Staff" concludes an investigation.

In the instant N.L.R.B. proceedings, Petitioners bore the brunt of the vested interests which the Regional Director had in the manner in which Hearing Officers conducted Hearings, the expediency with which the "Members of the Field Staff" concluded investigations, and the manner in which other subordinates took official actions.

8. Other Impermissible Interests Created by the S.E.S. Which Induce Competition Under the Performance Criteria

In addition to the rewards available to Regional Directors who compete successfully with colleagues, the S.E.S.

provides "negative" inducements for Regional Directors to demonstrate results which satisfy the Performance Criteria.

In this regard, 5 U.S.C. Sec. 4314 provides that each performance appraisal system shall provide for annual summary ratings of the levels of performance as follows:

(i) One or more fully successful levels

(ii) A minimally satisfactory level; and

(iii) An unsatisfactory level.

Regional Directors may be removed from the S.E.S. upon the receipt of <u>one</u> "less than fully successful executive performance" rating (5 U.S.C. Sec. 3592 <u>et seq.</u>), and <u>must</u> be removed if they receive two "unsatisfactory" ratings in any period of five consecutive years (5 U.S.C. Sec. 4314(b)(3)) or two "less than fully successful" ratings in any period of three

consecutive years. (5 U.S.C. Sec. 4314(b)(4)).

In addition, a Regional Director who receives a single "unsatisfactory" rating must be reassigned or transferred within the S.E.S., or, in some cases, removed from the S.E.S.

Regional Directors who are removed from their positions because of a "less than fully successful executive performance" may not be reinstated to any S.E.S. position.

Unlike federal employees who are not part of the S.E.S., Regional Directors may be reassigned involuntarily to other positions within the S.E.S. Moreover, Regional Directors would not have the right to challenge their removal to the Merit Systems Protection Board.

Thus, it is clear that Senior Executives have not only the "carrot" of

awards, but the "stick" of strict removal and reassignment provisions, to consider in striving to succeed under the S.E.S.

C. The Court Of Appeals Failed To Apply The Proper Standard To Determine The Constitutionality Of The S.E.S.

The Court of Appeals failed to articulate the standard by which it gauged the claims of risk of bias made by the Petitioners, unless it can be said to have done so by its reference to the Petitioners' statement of the controlling principles, at Page 3 of the Slip Opinion, which, itself, is drawn from this Court's opinions in Schweiker v. McClure, supra, Marshall v. Jerrico, supra, Gibson v. Berryhill, supra, Ward v. Village of Monroeville, supra, and Tumey v. Ohio, supra.

Yet, the Court of Appeals, in any event, failed to correctly apply existing

precedent.

Instead, the Court of Appeals faulted the Petitioners for claiming that the Regional Directors have only a possible financial stake in their decisions, while relying upon cases in which quasi-judicial or judicial officers had a direct financial interest effected by their decisions. (Slip Opinion, Page 15, App. 15).

Actually, it appears that the Court of Appeals' decision is reached in one sentence, following a comparative citation to Tumey v. Ohio, supra, and Ward v. Village of Monroeville, supra, as follows: "There is no showing that Regional Directors have any comparable possibility of a financial stake in their decisions". (Slip Opinion, Page 16, App. 16).

Assuming the above represented an accurate application of the appropriate standard, which it plainly does not, the

Court ignored anyway the Petitioner's chief reliance upon this Court's decision in Gibson v. Berryhill, supra, as stating the controlling standard.

Thus, the Court of Appeals cited Gibson only for the proposition that the burden is upon the Petitioners to establish a disqualifying interest (Slip Opinion, Pages 14-15, App. 14-15).

The Court articulated a difference in the circumstances involved in the Petitioners' appeal, from those of Tumey and Ward, by drawing a contrast between a "direct financial interest" and the mere possibility of receiving "performance awards." In so reasoning, the Court failed even to discuss Gibson, let alone distinguish this controlling precedent, even though this authority is squarely at odds with the Court's reasoning.

In this regard, the Regional Directors

have a far more imposing "financial stake" than that possessed by any one of the optometrists comprising the administrative board in Gibson.

Not one optometrist in Gibson could be certain that, by finding a defendant optometrist guilty of an "unlawful practice", such decision would redound to his or her personal benefit in the form of a fee from a former patient of the defendant optometrist. For that matter, the actions of a member of the administrative board would be determinative only in concert with other members of the administrative board, unlike Regional Directors of the Board who are authorized to function autonomously.

Moreover, the optometrists in Gibson could hardly identify, let alone quantify, the "financial reward" obtainable for any single license revocation.

To the contrary, a Regional Director can both identify, and quantify, his or her "financial stake" in reaching any decision, inasmuch as the pecuniary interest is specifically provided for by statute.

Even in the face of far less personal pecuniary interests than those attendant to the Regional Directors in the case at bar, this Court nonetheless held that the individual members of the administrative board of optometrists were constitutionally disqualified, since the result of their proceedings "could possibly redound to the personal benefit of members of the Board." 411 U.S. at 578. (Emphasis added).

The Petitioners submit that the error of the Court of Appeals is to be found in the fact that the Court erroneously shifted its attention from the question of whether Regional Directors are subject to an

impermissible pecuniary interest, to whether a Regional Director enjoyed the guarantee of reaping an award.

This, mistakenly, confuses the very point to the S.E.S. system - to wit, competition for rewards, and the attendant incentives which the S.E.S. was designed to promote.

The Petitioners submit that temptation is omnipresent under the S.E.S., since Regional Directors are exposed to the impermissible interests at all times, even though only the possibility exists that a given Regional Director might actually reap a financial benefit during any one fiscal year.

In any event, the impermissible pecuniary interests are only the "carrot" - the Court of Appeals remained totally silent as to the other impermissible interests injected by the S.E.S., such as

removal from the S.E.S. for poor performance, which represent the "stick," bringing their own pressures to bear upon the temptations of the S.E.S.

POINT III. THE COURT OF APPEALS DECISION, BASED UPON AN INADEQUATE RECORD, JUSTIFIES THE SUPREME COURT'S EXERCISE OF ITS POWER OF SUPERVISION

One of the reasons considered by the Court in determining whether to grant review on Writ of Certiorari is whether a federal court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." (Rule 17(a) of the Rules of the Supreme Court of the United States).

The Petitioners submit that, by deciding this matter without an adequate record before it, the Court of Appeals has

so far departed from the "accepted and usual course of judicial proceedings as to warrant the exercise of the Court's power of supervision."

In holding that "the record in the present case does not support the blanket allegation of respondents that the Board's appraisal system offers an incentive to Regional Directors to perform their duties with a bias toward outcomes that will enhance their opportunity to receive a performance award" (Slip Opinion, Pages 16-17, App. 16-17), the Court below based its ruling upon a record recognized to consist only of (1) the statutory provisions of the S.E.S., and (2) whatever "details as to the administration of the Senior Executive Service and the application of its performance appraisal system to Regional Directors" as could be "taken from the N.L.R.B. brief" filed with

the Court. (Slip Opinion, Pages 8-9, App. 8-9).

Although the Court of Appeals correctly noted that the burden of establishing a disqualifying interest rests on the Petitioners (Slip Opinion, Pages 14-15, App. 14-15), no factual record other than the S.E.S. statutory provisions existed before the Court of Appeals upon which the Petitioners could fairly rely.

Rather, the record cited by the Court was comprised merely of the S.E.S. statute, and sparse documentation selected by the N.L.R.B. for introduction, in the first instance, in its brief to the Appellate Court.

The Petitioners were not allowed any opportunity by the Board to develop a factual record concerning the application of the S.E.S. to the Regional Directors.

Most pointedly, during the

Representation Hearing in Canton Health Care Center, Inc., supra, the Hearing Officer stated that he would "...permit (the Employer) to raise the (S.E.S.) issue...," and then stated "...but I am not really going to litigate it." (T.[4] 6, lines 18-23)

In fact, a perusal of the transcript of the Representation Hearing before the Board in the Canton case demonstrates that the Hearing Officer repeated ad nauseum that he would not allow the Employer to litigate the S.E.S. issue in relation to the Petition, to the point where the Hearing Officer would not even allow an adjournment to permit service of subpoenas issued by

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[4] "T" followed by page and line numbers refers to the pages and lines of the Official Report of Proceedings Before the National Labor Relations Board, whose pertinent pages are included in the Appendix hereto.

him at the Hearing.[5]

Similarly, the Board summarily refused to pass upon the issue presented here in Ohio New and Rebuilt Parts, Inc., supra, and in Colonial Gardens Care Center, Inc., supra.

The Petitioners contend in the first instance that even given the state of the record, they met their burden of

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[5]Thus, the Hearing Officer stated: "I am not really going to litigate it. I can't litigate that." (T. 6, lines 20, 21); "This is not the proceeding to litigate such a question, you will do it some place else..." (T. 7, lines 3-4); "indicated that you could make a motion to dismiss the Petition based on that [the constitutional issue] ... It is something that you should have made" (T. 7, lines 6-11); "...[t]his is all in relation to that question that I am not going to litigate here -- I won't let you litigate?" (T. 9, lines 25, T. 10, lines 1,2): "We are not going to litigate anything here." (T. 10, lines 6,7); "...I don't believe that issue is one that can be litigated in this proceeding..." (T. 9, lines 21, 22).

establishing a disqualifying interest affecting the Regional Director - namely, the compensation scheme developed by the S.E.S. - even though they were deprived of any opportunity to develop a factual record before the N.L.R.B.

Thus, a bonus equating up to 20% of a Regional Director's pay, let alone lump sum awards of $10,000.00 or $20,000.00, constitute a "substantial" pecuniary interest, sufficient to raise the specter of bias.

However, as was noted by this Court in Schweiker v. McClure, supra, it could be probative, in considering the issue of possible bias in the performance of "quasi-judicial" and/or "administrative prosecutorial" functions, to take into account any evidence of "institutional or psychological" interests at play within the

proceeding in question. 456 U.S. at 192, Fn. 10.

Yet, the Petitioners were prevented at every stage of these proceedings from adducing such evidence.

Counsel for Petitioner Canton Health Care Center, Inc., stated to the Hearing Officer his desire to develop a "full and complete record on the operations of the Senior Executive Service" (T. 8, Lines 14-16). If allowed to develop a factual record, evidence could have been adduced bearing upon the S.E.S. issue, such as the following: Any proof of discontent by Regional Directors with the S.E.S. upon its inception, for fear that the competitive pay system it established would detract from their ability to function, and expert testimony concerning psychological tendencies to attain substantial bonuses.

Without benefit of a factual record on

the full import of the S.E.S., the Court of Appeals has issued a decision which - absent review by this Honorable Court - will serve as empty precedent regarding the substantial constitutional issues raised by the Petitioners.

CONCLUSION

WHEREFORE, in light of the exigent need for review of the significant questions at issue here, Petitioners respectfully request that the Petition for Writ of Certiorari be granted.

DATED: JULY 29, 1985

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AFFIDAVIT OF SERVICE OF PETITION FOR WRIT OF CERTIORARI AND APPENDIX

STATE OF NEW YORK,
COUNTY OF NEW YORK

I, Don T. Carmody, being duly sworn, say;

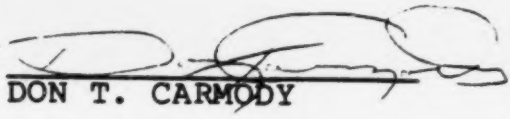
(1) I am not a party to the action, am over 18 years of age, and reside at 264 Thornridge Drive, Stamford, Connecticut 06903.

(2) In accordance with Rule 28 of the Rules of the Supreme Court of the United States, on Monday, July 29, 1985, I served the within Petition For Writ of Certiorari and Appendix to Petition for Writ of Certiorari by depositing true copies thereof in a United States Post Office, with first-class postage prepaid, upon the Clerk of the Supreme Court of the United States, and upon each of the following

persons at the last known address set forth after each name:

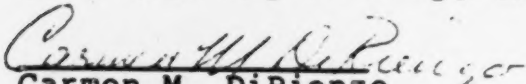
Frederick C. Havard, Esq.
Division Of Enforcement Litigation
National Labor Relations Board
1717 Pennsylvania Avenue
Washington, D.C. 20570

Solicitor General
United States Department Of Justice
Constitution Avenue
Washington, D.C. 20530



DON T. CARMODY

Sworn to before me
this 29th day of July, 1985



Carmen M. DiRienzo
Notary Public
State of New York
County of Westchester
Reg. No. 4741350
Term Expires: 3/30/87

No. 85-379

FILED
JUL 29 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States
October Term, 1985

OHIO NEW AND REBUILT PARTS, INC. and/or MEL'S BATTERY, INC., CANTON HEALTH CARE CENTER, INC. and COLONIAL GARDENS CARE CENTER, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 83-5785, 84-5283, 84-5174

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

OHIO NEW and REBUILT PARTS, INC., and/or MEL'S BATTERY, INC., (83-5785),
Respondent.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CANTON HEALTH CARE CENTER, INC., (84-5283),
Respondent.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

COLONIAL GARDENS CARE CENTER, INC., (84-5174),
Respondent.

ON PETITION to Enforce Three Orders of the National Labor Relations Board.

Decided and Filed April 30, 1985

Before: WELLFORD and MILBURN, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

PHILLIPS, Senior Circuit Judge. The National Labor Relations Board seeks enforcement of its decisions in three separate proceedings ordering each of the respondents to bargain upon request with a labor organization as representative of the respondents' respective employee units. Reference is made to the reported decisions of the Board for a recitation of pertinent facts.[1]

The three enforcement proceedings have been consolidated, pursuant to a joint motion of the parties, for the purpose of facilitating consideration by this Court of the common defense to the orders raised by each of the respondents.

I

The parties agree that the principal issue presented to this Court is the constitutionality of the Senior Executive Service provisions of the Civil Service Reform Act of 1978, as applied to NLRB Regional Directors, 5 U.S.C. §§ 3131 *et seq.*, 4311 *et seq.* The respondents have stipulated that the Board's orders otherwise are entitled to enforcement, as they are supported by substantial evidence on the respective records.

In urging that enforcement of the Board's orders be denied, all three respondents contend that the provisions of the Civil Service Reform Act of 1978 creating the Senior Executive Service are unconstitutional and deprive respondents of due

[1] Ohio New and Rebuilt Parts, Inc. and Mel's Battery, Inc., 267 NLRB 420 (1983); Canton Health Care Center, 269 NLRB No. 35 (No. 84-5283 March 2, 1984); Colonial Gardens Care Center, 268 NLRB 613 (1984).

process and equal protection of the law. Respondents' defenses to the Board's bargaining orders are predicated on the fact that the Board's Regional Director in the present proceedings is a member of the Federal Senior Executive Service, 5 U.S.C. § 3131, and, as such, was subject to the Board's performance appraisal system established pursuant to provisions of the foregoing statute.

Reliance is placed upon the principle, as described by respondents, that a judicial or quasi-judicial proceeding violates the due process clause of the fifth amendment "if there is an indication of any possible temptation to the average person performing quasi-judicial or 'administrative prosecutorial' functions to decide a matter with bias for or against any issue presented." Respondents state that "the legal yardstick, therefore, is *risk of bias*, not actual bias."

It is contended by respondents that the statutory provisions with respect to the Senior Executive Service are unconstitutional because they inject "personal financial interests and other irrelevant and impermissible interests into the administrative and enforcement processes engaged in . . . through the N.L.R.B. by linking the pay of Regional Directors . . ., who perform both 'quasi-judicial' and 'administrative prosecutorial' functions, to their performance of such functions in their administration of the National Labor Relations Act."

More specifically, respondents assert that as a result of membership of Regional Directors in the Senior Executive Service, "the amount of their compensation is directly dependent upon the particular types of alternative actions they choose to take at any given point during a representation proceeding or an unfair labor practice proceeding.

"The alternative actions to be taken in turn can be influenced by the speed with which the Regional Directors process matters before them."

The arguments of respondents are set forth in further detail in the following paragraphs of their briefs:

"Since in the natural course of events there exists a possible temptation to an average person acting as a Regional Director to process Representation Petitions, either personally or through delegation of authority, with undue emphasis upon the choice of official actions which serve to offer the Regional Director a better salary, and with further undue emphasis upon the expeditious treatment and disposition of cases toward that same end, there is an impermissible risk of bias – not to mention the glaring appearance of bias – on the part of a Regional Director to decide for or against any issue presented.

"Similarly, in the natural course of events there exists a possible temptation to an average person acting as a Regional Director to process Unfair Labor Practice Charges, either personally or through delegation of authority, with undue emphasis upon the selection of official actions which serve to offer the Regional Director a substantial increase in salary, and with further undue emphasis upon the expeditious disposition and treatment of cases toward that same goal, again resulting in the impermissible risk of biased decisions.

"In addition to violating the 'Due Process' guarantees of the Fifth Amendment, the S.E.S. also denies the Respondents the Equal Protection of the Laws guaranteed by the Fifth Amendment.

"The legislative classification system of the S.E.S. designates (1) the federal agencies which are and are not covered by the S.E.S., (2) the titles of positions authorized to be covered by the S.E.S., and (3) the 'quasi-judicial' functions which are and are not considered as Performance Criteria. This system results in a denial of Equal Protection in that certain persons appearing in various types of administrative proceedings which do not include functions considered as Performance Criteria, and/or who appear before individuals who are not Senior Executives, are not subject

to the same denial of Due Process as are the Respondents.

"The disparities in treatment to different groups of persons are not justified by a rational relationship to any legitimate governmental purpose, much less by a compelling government interest.

"Not only as enacted, but as demonstrated herein, in actual practice before the N.L.R.B., the S.E.S. has deprived the Employers of an impartial administrative tribunal in the first instance, thereby violating their rights to Due Process and Equal Protection of the Laws secured under the Fifth Amendment to the United States Constitution.

"By displacing the calculatedly just rule of law with the inevitably selfish rule of personal interest, such a compensation scheme effectively crumbles the foundation of the legal barrier to governmental arbitrariness.

"The Employers are raising *both* Due Process and Equal Protection of the Laws claims.

"Moreover, the Employers challenge 'quasi-judicial' functions performed by the Regional Director in their respective Representation proceedings, and *independently* challenge the 'administrative prosecutorial' and 'quasi-judicial' functions performed by the Regional Director in their respective Unfair Labor Practice proceedings."

II

The Civil Service Reform Act of 1978 was the most comprehensive revision of the federal civil service since the enactment of the Pendleton Act in 1883. P.L. 95-454, 95th Cong., 2nd Sess., 91 Stat. 1111. *See* S. Rep. No. 95-969, 95th Cong., 2nd Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 2723.

The Senior Executive Service is an integral part of the Civil Service Reform Act. The Senate Report describes the purpose of the Senior Executive Service as follows:

Senior Executive Service

Despite the critical need to recruit and develop the highest quality Federal executive, no fully effective governmentwide system exists today for selecting, preparing, advancing, and managing the men and women who administer the programs that affect every person in the Nation. At present neither the Congress nor the President has effective control over the size and distribution of executive level employees. In addition, the existing system for designating career and noncareer positions fails to provide adequate protection against politicization of the career service, yet it is so rigid that it fails to provide agency heads with sufficient flexibility to fill critical positions with executives of their own choosing. The current rank-in-position system of classifying jobs limits rotation and reassignment opportunities for career employees and prevents the best use of executive talent. Moreover, it is difficult to reward executives whose work is outstanding, and to reassign or remove executives whose performance is unacceptable. Finally, even with the rigid strictures governing executive employees, there is inadequate protection against political abuse and incompetence.

S. 2640 addresses these and other problems in the staffing and management of senior executive positions by creating a new Senior Executive Service (SES). Most senior positions in grades GS-16 through Executive Level IV will be assigned to SES. They will be subject to removal for inadequate performance, with a guaranteed right to a career position as at least a GS-15 without a loss in pay unless they were removed for misconduct, neglect of duty, or malfeasance. By statute, no more than 10 percent of the positions in the SES may be filled by noncareer executives. This statutory cap on noncareer appointments is an important check against politicization of the SES. Career appointments will be made by the agencies strictly on the basis of managerial merit. Newly appointed SES executives will serve a probationary ap-

pointment of one year. Each agency will develop annual performance appraisal systems for SES executives, with written appraisals based on established requirements. Executives will be shown the performance appraisal and rating and given an opportunity to respond in writing and have the rating reviewed at a higher managerial level. SES executives will be eligible for annual cash performance awards not to exceed 20 percent of their base pay, as well as awards for sustained excellence or sustained extraordinary accomplishments.

In the SES, rank will be based on an executive's individual talents and performance, not the position. Assignments in the SES will be made according to the overall needs of the government, thereby promoting its efficiency. This pattern also will permit more lateral mobility for executives than most presently enjoy. Increased mobility among Federal, State and local agencies and the private sector in turn, will mean decreased parochialism of outlook in the government's top managers.

Evaluation of executives in the SES will be based on their actual performance. Those whose work is exceptional will be eligible for performance awards. In addition, the psychic rewards will be considerable; serving in the SES will be an honor because it will be earned on merit. Those executives who cannot or do not live up to its standards will be removed, but their rights will be protected in a variety of ways. In a removal for misconduct they may appeal to the Merit Systems Protection Board. In unacceptable performance cases there is a detailed process required in the agency. In performance cases they can revert to the regular civil service as a GS-15.

This provision of S. 2640 should foster the development and effective use of senior executives in the Federal service. It is the kind of system that has been highly successful in the private sector, as well. It is an idea that public administrators have been advocating for decades,

> most notably in the second Hoover Commission report in 1955.
>
> *Id.* pp. 2732-33
>
> Title IV contains one of the most significant elements of the Civil Service Reform Act: Provision for the creation of a corps of top management leaders in a Senior Executive Service. The greatest asset and strength of any government is its top leadership. This is particularly true for the U.S. Government, which is the largest employer in the Nation. Its programs are far-reaching and complex, and they must be conducted with great sensitivity to conflicting public and private interests and with impartiality and compassion. Meeting this great responsibility requires strong executive leadership, which can respond to rapidly changing conditions and circumstances surrounding Federal programs and still chart a course which takes into account the national interest, the achievement of presidential and congressional goals, and simultaneously maintains the soundest management techniques.
>
> The committee believes that the establishment of a Senior Executive Service represents a major step toward the achievement of a goal of the most highly motivated and highly competent Federal service leadership possible.
>
> Title IV provides for the establishment of a new Senior Executive Service to include most of the top executive positions in the Federal service.
>
> *Id.* p. 2789.

The provisions of the Civil Service Reform Act of 1978 were designed to enforce the merit principle in the civil service by allowing civil servants to be fired, hired or rewarded upon the basis of performance. 5 U.S.C. § 5384 provides for "performance awards" not exceeding 20% of the executive's base salary, for not more than 50% of the Senior Executive Service positions in the agency.

Appendix A to this opinion sets forth details as to the

administration of the Senior Executive Service and the application of its Performance Appraisal System to Regional Directors. Appendix A is taken from the NLRB brief in the present consolidated cases.

Appendix B to this opinion is the Board's Revised Appraisal System for Regional Directors, effective January 1, 1981, and amended April 13, 1982.

III

Only one judicial decision involving the constitutionality of the statute creating the Senior Executive Service has been cited to the Court: the unpublished memorandum opinion of the United States District Court for the District of Columbia, styled *Canton Health Care Center, Inc.*, v. *United States*, Civil Action No. 82-2511, filed October 31, 1983.[2] The plaintiffs were two of the respondents in the present case: Canton Health Care Center, Ohio New and Rebuilt Parts, Inc. and Mel's Battery, Inc.

The memorandum opinion of District Judge Harold H. Green stated:

> Plaintiffs challenge the constitutionality of the statute establishing the Senior Executive Service (S.E.S.)[1] on the ground that the compensation scheme established by this program injects "substantial personal, financial and other irrelevant and impermissible interests" into the administrative and enforcement processes engaged in by employees of the federal government. Plaintiffs, three corporations involved in proceedings before Region

[2] On September 13, 1982, in the same case, the District Court for the District of Columbia denied plaintiffs' application for a preliminary restraining order to restrain the holding of an NLRB union representation election. The court held that plaintiffs had failed to establish that they were likely to succeed in their charge that the decision of the Regional Director in ordering the election was tainted by a desire to receive merit points improving his chances of obtaining financial awards under the Senior Executive Program. 97 Labor Cases (CCH) ¶ 10, 264.

8 of the National Labor Relations Board (NLRB),[2] contend that they were deprived of an impartial administrative tribunal in violation of the Fifth Amendment because the pay of the Regional Directors of the NLRB is improperly linked to their expeditious performance of certain responsibilities. The essence of plaintiffs' theory is that participation by Regional Directors in the S.E.S. results in an undue emphasis on the speed at which matters before the NLRB are resolved, thereby creating an unlawful risk of bias for or against issues presented to the Board. Presently before the Court is defendants' motion to dismiss.

First. Plaintiffs apparently seek a declaration of unconstitutionality of the entire S.E.S. pay system, at least as it applies to federal employees who perform "quasi judicial" or administrative prosecutorial functions. However, the complaint fails entirely to allege any injury to plaintiffs as a result of the government-wide implementation of the S.E.S. program. Only one federal employee who is a member of the S.E.S. – the Regional Director of Region 8 of the NLRB—is alleged to have taken any actions which might have resulted in injury to the plaintiffs. For this reason, plaintiffs lack standing to challenge the legality of the S.E.S. program in its entirety; they have standing at best to challenge only the constitutionality of the S.E.S. as it applies to the performance of functions by the Regional Directors of the NLRB. See *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1982).

Plaintiffs' standing cannot be enlarged by characterizing this lawsuit as one challenging the "interests" created by the S.E.S. system. Such a formulation, if accepted by the Court, would effectively nullify the injury-in-fact requirement, and it would allow plaintiffs to challenge alleged illegal consequences of the program with respect to segments of the federal government having no connection to the proceedings in which they are involved

before the NLRB. Indeed, plaintiffs' own description of the complaint confirms that the basis of this action is nothing more than the alleged unconstitutional interests which the S.E.S. injects into actions taken by NLRB Regional Directors.[5]

• • •

All of these conclusions are reinforced by the fact that plaintiffs' substantive challenge to the S.E.S. compensation scheme is patently without merit. Even if it be assumed that the NLRB Regional Directors act in a quasi-judicial capacity when considering representation petitions and unfair labor practice charges,[12] there is no basis for the claim of bias in connection with the handling of such matters. An unconstitutional risk of bias is not created simply because officials have been given an incentive to handle matters expeditiously. All employees of the federal government, regardless of whether they are Senior Executives, have— or should have— an incentive to deal with the matters before them on an efficient basis. There is a far and totally unwarranted leap from the premise of an incentive to handle matters expeditiously to the conclusion that this creates an unconstitutional conflict of interest.

The primary thrust of plaintiffs' complaint appears to be not that the Regional Director of Region 8 is biased against them, but simply that the financial interest which he may have in the speed with which he processes petitions results in a risk of bias "for or against any issue presented." Judicial and administrative adjudicators may not, consistently with due process, have a financial interest in the matter which is the subject of . . . administrative proceedings. See, *e.g.*, *Gibson* v. *Berryhill, supra; Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927). But an administrator does not have such interest merely because he may be motivated to resolve proceedings themselves expeditiously.[14]

It might finally be noted that the speed at which matters are resolved is only one factor among several in the S.E.S. incentive awards system. See note 1, *supra*.[15] If anything, it seems that due process guarantees would more likely be violated if administrators had no incentive to process matters efficiently and with an emphasis on quality than is true under the present scheme.

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[1] See 5 U.S.C. §§ 5381 *et seq.* The S.E.S., which became effective on July 13, 1979, is a system of compensation for employees of the federal government above the rank of GS-15 and below Level III of the Executive Schedule, with certain exceptions (*e.g.*, members of the judicial branch, administrative law judges, and positions filled by Presidential appointment with the consent of Congress). The central feature of the S.E.S. program is the grant on an annual basis of monetary awards which are added to the Senior Executive's base salary. Selection for these awards is based on the following criteria: (1) improvements in efficiency, productivity, and work quality, (2) cost efficiency, (3) timeliness of performance, (4) success in meeting affirmative action goals, and (5) indications of the effectiveness, productivity and performance quality of the employees for whom the Senior Executive is responsible. See 5 U.S.C. §§ 4313, 5382-84.

[2] Two of the plaintiffs — Ohio New & Rebuilt Parts, Inc. and Mels Battery, Inc. — are defending unfair labor practice charges which are before an administrative law judge of the NLRB. The third plaintiff — Canton Health Care Center, Inc. — initially sought to enjoin a representation election among certain of its employees, which had been ordered by the NLRB. On September 13, 1982, Judge Joyce Hens Green denied the request for a temporary restraining order, and the representation election was subsequently held. The employees voted to unionize, leading Canton Health Care Center, Inc. to file objections with the NLRB.

[5] Plaintiffs summarize their complaint as follows:

> [T]he Complaint alleges that the S.E.S. injects substantial personal, financial interests and other irrelevant and impermissible interests into the performance by the Regional Directors of "quasi-judicial" and "administrative prosecutorial" functions so as to offer a possible temptation to the average person performing such functions to decide with bias for or against any issues presented.

[12] See *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973).

[14] For the same reasons, plaintiffs' claims that the Regional Directors' participation in the S.E.S. program violates the policy goals set forth in the Federal Criminal Bribery, Graft and Conflict of Interest statute, 18 U.S.C. § 201 *et seq.*, as well as several

other executive orders designed to prevent conflicts of interest, are without merit.

[15] The NLRB itself noted in *French Hospital Medical Center*, 254 NLRB 711, 711 n. 3 (1981) that

> the rapidity with which representation cases are processed is but one of many factors considered under the Senior Executive Service compensation plan. Another factor is the quality of the Regional Director's decisions and the percentage of reversals by the Board.

The Court of Appeals for the District of Columbia affirmed the District Court in an unpublished order on the ground of lack of standing. *Canton Health Care Center, Inc.* v. *United States*, 750 F.2d 1093 (1984).

In the proceedings before the Board against respondent Canton Health Care Center, the Board issued its decision and bargaining order on March 21, 1984, finding that Canton had refused to bargain with the Union in violation of 29 U.S.C. § 158 (a)(5) and (1). The Board noted that it had denied Canton's August 26, 1982 request for review based on the alleged unconstitutionality of the Senior Executive Service.

In *French Hospital Medical Center*, 254 NLRB 711 (1981), the Board found that the rulings of the Regional Director on interim appeals were "free of prejudicial error." In a footnote, the Board said:

> During the hearing the Employer challenged the Regional Director's ability to make unbiased interim rulings regarding various objections and its request for a continuance. The Employer asserts that the Regional Director as a member of the Senior Executive Service established by the Civil Service Reform Act of 1978, 5 U.S.C. 2301, *et seq.*, could receive a bonus. One of the elements used to determine whether or not she receives a bonus, and its amount, is the speed with which representation cases are processed within her Region. The Employer claims that the Regional Director made adverse interim rulings and denied its request for a continuance because of pecuniary interest, thereby violating its right to due process.

The constitutionality of the Senior Executive Service appears to be a question of first impression among the Courts of Appeals. The Supreme Court, however, has addressed the standards applicable in determining whether a government official performs his duties with impermissible bias. In *Schweiker* v. *McClure*, 456 U.S. 188 (1982) the Court was presented with a due process challenge to the adequacy of procedures for reviewing an insurance carrier's refusal to pay claims filed under the Medicaid program. Review of the carrier's decision not to pay a claim was available through a "review determination" by another employee of the same carrier. Further review was available for claimants at an oral hearing presided over by an officer chosen by the carrier. 456 U.S. at 191.

Justice Powell, for a unanimous Court, wrote:

> The hearing officers involved in this case serve in a quasi-judicial capacity, similar in many respects to that of administrative law judges. As this Court repeatedly has recognized, due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities. *E. g., Marshall* v. *Jerrico, Inc.*, 446 U. S. 238, 242-243, and n. 2 (1980). We must start, however, from the presumption that the hearing officers who decide Part B claims are unbiased. See *Withrow* v. *Larkin*, 421 U. S. 35, 47 (1975); *United States* v. *Morgan*, 313 U. S. 409, 421 (1941). This presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification. See *Gibson* v. *Berryhill*, 411 U. S. 564, 578-579 (1973); *Ward* v. *Village of Monroeville*, 409 U. S. 57, 60 (1972). See also *In re Murchison*, 349 U. S. 133, 136 (1955) ("to perform its high function in the best way 'justice must satisfy the appearance of justice' ") (quoting *Offutt* v. *United States*, 348 U. S. 11, 14 (1954)). But the burden of establishing a disqualifying interest rests on the party making the assertion.

> Fairly interpreted, the factual findings made in this case do not reveal any disqualifying interest under the standard of our cases.
>
> 456 U.S. at 195-96.
>
> • • •
>
> "[D]ue Process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). We have considered appellees' claims in light of the strong presumption in favor of the validity of congressional action and consistently with this Court's recognition of "congressional solicitude for fair procedure . . . ." *Califano* v. *Yamasaki*, 442 U. S. 682, 693 (1979). Appellees simply have not shown that the procedures prescribed by Congress and the Secretary are not fair or that different or additional procedures would reduce the risk of erroneous deprivation of Part B benefits.
>
> 456 U.S. at 200.

There is a strong and firm presumption that governmental officials, such as the Regional Director, perform their functions without bias. *Schweiker, supra*, 456 U.S. at 195; *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975). This presumption can be rebutted, *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973), but the burden of establishing a disqualifying interest is upon the person making that contention. *Schweiker, supra*, 456 U.S. at 196. The impermissible interest that would motivate bias must be realistic and more than "remote." *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 250 (1980).

Respondents in the present case contend that the Regional Directors have a financial stake in their decisions because of the *possibility* of receiving performance awards. For this proposition they cite cases in which a quasi-judicial or judicial officer had a *direct* financial interest affected by his decisions, such as *Tumey* v. *Ohio*, 273 U.S. 510, 531 (1927) (mayor acting as judge shared in the fees and costs levied by him)

and *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972) (mayor responsible for village finances could not act as judge when fines and forfeitures provided a substantial portion of village funds). There is no showing that Regional Directors have any comparable possibility of a financial stake in their decisions.

The presumption of impartiality of Regional Directors is complemented by the authority of Congress to regulate completely the positions of federal civil servants. *Ramspeck* v. *Federal Trial Examiners Conference*, 345 U.S. 128 (1953); *see also Matthews* v. *Eldridge*, 424 U.S. 319, 355 (1976), holding that due process analysis requires balancing of governmental interest in existing procedures against the risk of erroneous deprivation of a private interest through the use of these procedures.

The Board's appraisal system for Regional Directors (see Appendix B to this opinion) embraces each of the factors set forth in the Civil Service Reform Act, 5 U.S.C. § 4313.

Critical Elements used to assess the performance of a Regional Director are: (1) Effectiveness and Efficiency of Performance; (2) Quality of Casehandling; (3) Achievement of Agency Objectives; and (4) Staff Relations. Respondents distort the significance of the first "Critical Element" and down play the importance of the other three elements. They claim that the first element tempts the Regional Director to dispose of matters with reckless speed in an effort to earn a "performance award." This contention ignores the fact that the second, third and fourth critical elements each allow a maximum of 25 points, the same as the first. Appendix B to this opinion lists the nine factors weighed by the Board in determining the appropriate point award (up to 25) for effectiveness and efficiency of performance.

We hold that the record in the present case does not support the blanket allegation of respondents that the Board's appraisal system offers an incentive to Regional Directors to

perform their duties with a bias toward outcomes that will enhance their opportunity to receive a performance award.

We conclude that the provisions of the Civil Service Reform Act of 1978, creating the Senior Executive Service and applied to NLRB Regional Directors, are valid constitutional enactments and that respondents have not established that they have been deprived of due process or equal protection of the law.

IV

In the order of the Board reported at 267 NLRB 420, Case No. 83-5785, respondents Ohio New and Rebuilt Parts, Inc. and Mel's Battery, Inc. are required upon request to recognize and bargain with Truck Drivers, Warehousemen and Helpers Union Local No. 908, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of all employees in the appropriate bargaining unit.

In its order reported at 269 NLRB No. 35, Case No. 84-5283, respondent Canton Health Care Center, Inc. was required on request to bargain with the United Food and Commercial Workers Union Local 698, AFL-CIO-CLC as the exclusive representative of all employees in the appropriate unit.

In its order reported at 268 NLRB 613, case No. 84-5174, respondent Colonial Gardens Care Center, Inc. was required on request to bargain with the United Food and Commercial Workers Union Local 698, AFL-CIO as the exclusive representative of the employees in the bargaining unit.

The respondents have stipulated that the orders of the Board are supported by substantial evidence on the respective records.

Enforcement of all three of the orders of the Board is granted. No costs are taxed. The parties will bear their own costs in this Court.

Appendix A

Application of Senior Executive Service Appraisal System to NLRB Regional Directors

[A]mong the major provisions governing the Senior Executive Service are:

compensation system, including "incentives," to attract and retain competent executives, and a system that makes an executive's compensation, retention, and tenure contingent on successful performance of his duties (5 U.S.C. 3131). The link between an executive's compensation, retention, and tenure and his level of performance is obtained by way of the comprehensive performance appraisal system. (5 U.S.C. 4312, et seq.) Each agency is responsible for the development of its own appraisal system. The system should "encourage excellence of performance" (5 U.S.C. 4312(a)(3)) and provide (1) "accurate evaluation of performance . . . on the basis of criteria . . . related to the position and which specify the critical elements of the position" (5 U.S.C. 4312 (a)(1)); (2) appraisals on a systematic basis (5 U.S.C. 4312(a)(2)); and (3) a basis for determining the executive's eligibility for remaining in the Senior Executive Service or receiving a performance award (5 U.S.C. 4312(a)(4)).

Evaluation of the executive's performance is statutorily mandated to consider such individual and organizational performance factors as the following five (5 U.S.C. 4313):

1. improvements in efficiency, productivity, and quality of work or service, including any significant reduction of paperwork;
2. cost efficiency;
3. timeliness of performance;
4. other indications of the effectiveness, productivity, and performance of the employees for whom the senior executive is responsible; and
5. meeting affirmative action goals and achievement of equal employment opportunity requirements.

The evaluation system is monitored in each agency by a "performance review board" that reviews the initial evaluation of an executive's performance by his immediate supervisors, considers the executive's response to the initial evaluation, if any, and then makes recommendations to the agency's head concerning the evaluation (5 U.S.C. 4314(c)(1) – (3)). These appraisals of the executive are done on an annual basis. They summarily rate the executive's performance as being at one or more successful levels, a minimally satisfactory level, or an unsatisfactory level. (5 U.S.C. 4314(a)) An executive may be eligible for a performance award if he receives a fully successful rating (5 U.S.C. 5384 (a)(1), (b)(1)), or he may be transferred, reassigned, or removed from the Senior Executive Service if he receives an unsatisfactory rating (5 U.S.C. 4314(b)(3) and (4)), with removal from the Service being required if in two of five consecutive years he receives an unsatisfactory rating or in two of three consecutive years he receives less than a fully successful rating (5 U.S.C. 4314 (b)(2) – (4)).

An executive who receives a fully successful rating may be eligible for a performance award, the statutory incentive to "encourage excellence in performance by career appointees" (5 U.S.C. 5384(a)(1)). The performance review board at each agency recommends to the agency head which executives should receive performance awards (5 U.S.C. 5384(c)). The amount of the performance award is determined by the head of the agency, but cannot exceed 20 percent of the executive's base salary (5 U.S.C. 5384(b)(2)). The number of executives receiving such awards in any agency cannot exceed 50 percent of the number of executives in the agency (5 U.S.C. 5384(b)(3)). In addition, agencies on an annual basis may recommend to the Office of Personnel Management career executives who, on account of performance, warrant the rank of Meritorious Executive or Distinguished Executive. Those ranks, if granted by the President upon the recommendation of the Office of Personnel Management,

entitle the Meritorious Executive to a $10,000 lump sum award and entitle the Distinguished Executive to a $20,000 lump sum award (5 U.S.C. 4507).

Pursuant to 5 U.S.C. 3132(a)(2) and Section 413 of the Civil Service Reform Act, the Board designated the position of Regional Director as a Senior Executive Service position. As of July 1, 1979, the effective date of the governing statute, all of the Board's Regional Directors had voluntarily converted from their general schedule status to the status of members of the Senior Executive Service.

Pursuant to the statutory prescription, the Board developed an appraisal system suited to the position and responsibilities of the Regional Director; the appraisal system was approved by the Office of Personnel Management on December 30, 1979 (S.A. 5, 12-19).

There are four "critical elements" under which the Regional Director is evaluated on an annual basis: (1) "Effectiveness and efficiency of performance;" (2) "Quality of case-handling"; (3) "Achievement of agency objectives;" (4) "Staff relations including development and training of subordinates." Performance under each of the four critical elements is of equal importance, 25 points being the maximum weight assigned to each, for a potential total of 100. The determination of how many points a Regional Director is awarded under each element is dependent on whether and to what extent the Regional Director has satisfied certain goals specified in sub-headings of the critical elements. (S.A. 15-19.)

Under critical element I, effectiveness and efficiency of performance, the Regional Director is evaluated on how well he attains certain goals in the performance of nine specified responsibilities ("performance factors"): (1) Settlement agreements should be reached in 82.6 percent of the meritorious unfair labor practice cases; (2) Election agreements

should be reached in 80 percent of relevant representation cases; (3) Regional Director decisions required prior to elections should issue in a median of 45 days from the filing of a representation petition—that is, half of those decisions should issue in 45 days or less and half may issue in 45 days or more;[9] (4) Post-election reports, decisions and supplemental decisions should issue in a median of 40 days from the filing of objections and/or ballot challenges; (5) elections should be conducted in a median of 50 days from the filing of a petition; (6) complaints should issue in a median of 45 days from the filing of charges; (7) the Regional Director's determinations on unfair labor practice charges should be implemented in a median of 45 days from the filing of the charge in 98 percent of the cases; (8) 95 percent of cases in which a Board decision or Court order has been received should be closed within 80 days; (9) Priority cases should be handled in accordance with GC memorandum 77-9. (S.A. 15-16, 29-31.)

The determination of the extent to which a Regional Director has been successful or unsuccessful in satisfying those specific performance factors under critical element I includes an evaluation of the extenuating circumstances that existed during the relevant appraisal period (S.A. 15 n. 1):

> Illustrative factors of extenuating circumstances that may be considered are the following: serious travel problems; suboffices; regional offices understaffed; handling of exceptionally time-consuming cases(s); large number of priority cases; exceptionally inclement weather (snow, etc.); exceptionally inexperienced professional staff;

[9] In other words, where a performance factor is expressed in terms of a median number of days, for example, 45 days for issuance of a pre-election decision, the Regional Director fully meets that goal if only half of the evaluated actions are taken in that number of days or less. Since the performance factor is not an "average," the Regional Director who meets the median is not helped additionally by determinations that take less than, for example, 45 days, or harmed if half the determinations take longer than 45 days.

> highly significant improvement in overall performance; exceptionally large numbers of supervisors and regional management used for Agency training purposes; excessive number of foreign speaking persons involved in case(s); and size of regional office staff.

The assignment of the number of points, out of a maximum of 25, that a Regional Director receives under any of the four critical elements is, in major part, a subjective judgment about what the Regional Director's performance, as measured against the performance factors, means when viewed in the light of the total circumstances in which the Regional Director was required to perform. For the Court's information, a sanitized appraisal of a Regional Director has been included in the Supplemental Appendix. (S.A. 47-56.)

Review of the Regional Director's performance under critical element I is an ongoing process conducted by the Assistant General Counsels of the Division of Operations Management. The continuous monitoring of the Region's performance is described in DeSio and Higgins "The Management and Control of Case Handling, Office of the General Counsel, NLRB," 2 *The Bureaucrat*, 385 (1974). On a monthly basis, the Regional Director submits to the Assistant General Counsel responsible for his Region a monthly report that reflects information on actions taken in cases. The Regional Director is required to explain why any case has not yet been processed to that stage of the proceeding where, under time standards, it would ordinarily be expected. The data received from the Regions on their caseload is tabulated and organized into statistics and then reviewed by the Assistant General Counsel, who, in turn, reports his analysis of the Region's work performance back to the Region with suggestions for improvements (id. p. 391):

> Briefly then, a Regional Director receives on a monthly basis a review of the performance of his office which

> is available both to Washington and Region staff. It identifies areas for improvement and provides a continuum of short-range case handling objectives. The Regional Director also receives a series of charts which, without identifying the standing of the other regions, reflects his satnding in comparison to other Regional Offices.

With respect to the time standards outlined in critical element I of the appraisal system, they for the most part pre-date the Senior Executive Service and its requirements. Thus, as DeSio and Higgins point out (id. at 385, 389-390), the time standards were the result of an intense effort by the Board to eliminate delays in the processing of cases, a matter which for many years prior to the adoption of these standards was the source of much criticism directed at the Board. The performance evaluation system now incorporated under critical element I has been in place at the Board since 1959, and the Regional Directors have since then been required to perform their jobs in accordance with the goals that system established. See "Twenty Years of Productivity" 2 *Performance* No. 1 (U.S. Office of Personnel Management, February, 1981) (S.A. 41-46).

Critical element II—quality of casehandling—outlines the procedures by which the quality of the work done in the Regional Offices is assessed. On a random basis, files at the Regional Offices are reviewed to determine the appropriateness of actions taken in cases, including, as here, decisions and directions of elections; to determine whether actions taken are in "conformity with law, Agency regulations, policies, and procedures;" and to determine the completeness of investigations. Also, the particular documents issued by the Region, such as settlement stipulations, pleadings and complaints, are scrutinized for their quality. In addition, there is a review of the "[r]eversal of decisions of the Regional Director" factor that considers (S.A. 18):

1. Reversals on appeals of C cases [unfair labor practice cases]
2. Reversals of pre-election RD Decisions or dismissals of R cases [representation proceedings] (based on other than change in policy)
3. Reversals of RD Decisions objections/challenges based on other than change in policy.

The review of the performance factors under critical element II is also a continuous process. Thus, the Assistant General Counsels of the Division of Operations Management pay the Regional Offices frequent visits "to discuss all aspects of Regional Office work, including the quality of the work of the office and its personnel management and labor relations . . . [and] conducts an audit of closed case files." DeSio and Higgins "The Management and Control of Case Handling, Office of the General Counsel, NLRB" 2 *The Bureaucrat* 385, 391 (1974); see also "Twenty Years of Productivity" 2 *Performance* No. 1 at p. 4 (U.S. Office of Personnel Management, February, 1981) (S.A. 44).

The Board's appraisal system also includes an evaluation of how well the Regional Director performs in meeting agency objectives—critical element III (S.A. 18). Under this element, the Regional Director is assessed on maintaining good public relations, conforming to the Board's personnel and administrative regulations and policies, appropriately utilizing staff, and supporting agency programs such as interregional cooperation. Critical element IV (S.A. 19) assesses the Regional Director's performance in implementing the Board's national equal employment opportunity plan, the collective bargaining agreement between the Board and its employees, and the staff relations program, including the development and training of subordinates.

Under the Board's appraisal system, there is a four-tier rating procedure (S.A. 9-10):

a. *Highly Successful Performance*: exceeds established standards for fully successful performance in all or most critical elements and fully meets standards in the remainder.

b. *Fully Successful Performance*: fully meets the standard for this posiiton in all critical elements.

c. *Minimally Satisfactory Performance*: needs to improve performance in one or more significant factors of critical elements.

d. *Unsatisfactory Performance*: performance is below expected standards in one or more critical elements to an extent which adversely impacts organizational effectiveness.

In order for a Regional Director to be eligible for a performance award, he must be rated either "highly successful" or "fully successful." A performance award is not, however, necessarily granted in any given year to an eligible Regional Director merely because he has attained more points than another eligible Regional Director. The Board has never recommended a Senior Executive for a "Distinguished Executive" or "Meritorious Executive" rank.

Appendix B

Appraisal System for Regional Directors

Attached hereto is the modified Directors' performance plan which has been developed in consultation with you over the past several months. The plan will be used for the appraisal period which ended December 31, 1980 as well as for the subsequent appraisal period which covers the calendar year 1981. The modifications are discussed below.

The four Critical Elements are weighted equally. Under the new system, there will be no bonus points in the evaluation process or performance bands under the first Critical Element. Extenuating circumstances, such as those listed in footnote 1 of the performance plan, will, of course, continue to be considered.

The goal for Settlement Agreements for the period ending December 31, 1980, is 82.6 percent which is the cumulative rate achieved nationally for the preceding appraisal period which ended February 29, 1980. The settlement goal for subsequent appraisal periods will also be based upon the cumulative settlement rate for the preceding appraisal period. We will advise you of the settlement figure which will be used for the appraisal period beginning January 1, 1981, when we have the cumulative rate for the period ending December 31, 1980.

The standard for Post Election Proceedings, including hearing and nonhearing cases, is 40 median days for the appraisal period which ended December 31. Beginning January 1, 1981, however, we will evaluate hearing cases separately from cases processed by way of administrative investigations. The time goal for hearing cases – which includes cases in which hearing officer reports, supplemental decisions and decisions were issued – will be a median of 90 days, and for nonhearing cases it will be a median of 35 days. If the

Agency adopts the *Claxton* approach for processing objections and challenges, we will reconsider the time goal for hearing cases with the view of establishing separate goals for report cases and cases in which decisions or supplemental decisions issue. With respect to Elections, the new time goal for conducting elections is 50 median days which is in line with our national experience. As to 45-Day Cases Within Control ,the revised standard is 98 percent of the Region's dispositions within 45 days of the filing of the charge. Again, our national experience demonstrates that most Regions have been achieving this percentage. Similarily, the revised standard for Unexcused Overage Compliance Cases – 95 percent of the Region's compliance cases closed within 80 days of the receipt of the Board Order or Court Decision —— is based upon our national experience. Both of these factors will be measured cumulatively. And finally, with respect to the quality of Advice and Appeals submissions, any deficiences will be noted in the appraisal so that corrective aciton can be taken.

We wish to clarify the manner in which priority cases and EEO goals are evaluated. With respect to priority cases, we will continue to take into account the volume of these cases the Regions handle and their impact upon the handling of other cases.

The criteria for evaluating EEO goals remains the same. However, the Director's appraisal will be based upon his or her contribution toward achieving the goals *during* the appraisal period. We will not penalize a Director for not meeting a goal when the circumstances which occurred during the appraisal period did not provide a reasonable opportunity for doing so. For example, the fact that the Region was not able to hire employees during the appraisal period would clearly justify not meeting the goal.

The procedure for the appraisal period ending December 31, 1980 will be essentially the same as the one used for the

initial evaluations. The time frames have been adjusted so that at least 120 days[1] will elapse before the summary ratings are finally issued. The significant steps in the appraisal process are outlined in this paragraph. The Directors have already been advised that they should promptly submit pre-appraisal comments to their Assistant General Counsels, if they wish to do so. The Assistant General Counsels will issue the initial evaluations and summary ratings by March 10. The summary ratings will continue to be: highly successful (81 to 100 points), fully successful (64 to 80 points), minimally satisfactory (40 to 63 points) and unsatisfactory (below 40 points).

If it is necessary for the Assistant General Counsels to formulate guidelines for evaluating the Directors, the Directors' Committee will be involved in the discussions that lead to such guidelines. Copies of any such guidelines will be provided to all Directors. The Directors who wish to seek review of their appraisals must submit the "Request" and supporting comments to Associate General Counsel Joseph E. DeSio by March 30. The Associate General Counsel will grant a *de novo* review of the submissions, will issue his written responses, and will forward the appraisal packages to the Performance Review Board by April 17. The PRB presently consists of the Deputy General Counsel, the Deputy Associate General Counsel, Division of Operations Management; Associate General Counsel, Division of Advice; the Executive Secretary, and the Director of the Office of Representation Appeals. The PRB will complete its review and make its recommendations to the General Counsel by May 20. The General Counsel will consult with the Board and the final summary ratings and bonuses will issue by June 26, 1981.

I wish to again express my appreciation to all the Directors

[1] Section 4314(b)(1)(C) of the Civil Service Reform Act precludes the Agency from issuing final summary ratings within 120 days after the beginning of a new Presidential administration.

and the Director's Committee for the assistance provided in developing the revisions to the performance plan. We intend to continue to review Critical Elements and Performance Standards and to make additional changes where experience demonstrates that modifications are warranted. We believe that the revised system will enable the Agency to appropriately recognize and reward its Directors.

W. A. L.

Attachment

CRITICAL ELEMENTS OF REGIONAL DIRECTOR POSITION TOGETHER WITH THE PERFORMANCE FACTORS COMPRISING EACH CRITICAL ELEMENT[1]

CRITICAL ELEMENT ONE: (25 points)
EFFECTIVENESS AND EFFICIENCY OF PERFORMANCE:

Settlement Agreements: The assessments will be based upon the Region's success in achieving an 82.6 percent settlement rate.

Election Agreements: The assessment will be based upon the Region's success in achieving an 80 percent election agreement rate.

Regional Director Decision (pre-election): The assessment will be based upon the Region's success in issuing

[1] Exceptional and/or improved performance in the critical elements as well as extenuating circumstances will be considered in appraising the Directors. Illustrative factors of extenuating circumstances that may be considered are the following: serious travel problems; Sub-offices; Regional Office understaffed; handling of exceptionally time-consuming cases(s); large number of priority cases; exceptionally inclement weather (snow, etc.); exceptionally inexperienced professional staff; highly significant improvement in overall performance; exceptionally large numbers of supervisors and Regional management used for Agency training purposes; excessive number of foreign-speaking persons involved in case(s); and size of Regional Office staff.

its Regional Director Decisions within a median of 45 days from the filing of the petitions.

Post Election Proceedings:[2] The assessment will be based upon the Region's success in issuing its Reports, Decisions and Supplemental Decisions in post-election proceedings within a median of 40 days from the filing of the objections/challenges.

Elections: The assessment will be based upon the Region's success in conducting elections within a median of 50 days from the filing of the petitions.

Complaints: The assessment will be based upon the Region's success in issuing its complaints within a median of 45 days from the filing of the charges.

Percentage of 45-day Cases Within Control: The Assessment will be based upon the Region's success in implementing 98 percent of its determinations within 45 days of the filing of the charges.

Percentage of Unexcused Overage Compliance Cases Within Control:[3] The assessment will be based upon the Region's success in closing 95 percent of its compliance cases within 80 days of its receipt of the Board Order or Court Decision.

Priority Cases: The assessment will be based upon an

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[2] This performance factor evaluates hearing and nonhearing cases. In hearing cases, it includes: Hearing Officer reports in stipulation for certification cases, supplemental decisions in directed cases, and decisions in consent cases. In nonhearing cases it includes: Reports in stipulation for certification cases, supplemental decisions in directed cases, and decisions in consent cases. Beginning January 1, 1981, the time goal for hearing cases will be a median of 90 days, and for nonhearing cases will be a median of 35 days. If the Agency adopts the *Claxton* approach for processing objections and challenges, these time goals will be reconsidered.

[3] This factor evaluates the timeliness of compliance in cases in which a Board Order or Court Decision has issued.

overall analysis of priority casehandling performance in accordance with GC Memorandum 77-9.

CRITICAL ELEMENT TWO: (25 points)
QUALITY OF CASEHANDLING:

Assessment will be based on:

A. Litigation results with appropriate consideration for merit factors and settlement rates.

B. Quality Review of *R* and *C* closed case files to include:

1. Review will include at least the cases listed below, of which a significant number will be nonmerit cases:

15 CA cases	)	Review recently closed
10 CB cases	)	cases – withdrawals
5 priority cases	)	dismissals not appealed
	)	and informal
	)	settlements/adjustments

10 R case files including some cases in which RD Decisions or Reports on Objections and Challenges have issued.

2. The appropriateness of actions taken in the case including the correctness of ultimate decision.

3. The completeness of the investigation.

4. Whether the file is self-contained.

5. Conformity with law, Agency regulations, policies and procedures.

6. Review recent withdrawals to determine conformance with General Counsel's Information Officer Program, extent of investigation beyond

initial affidavit and interval between filing and approval of withdrawal.

Any deficiencies noted will be promptly communicated to the Director so that corrective action can be taken during the appraisal period. The Director will not be penalized for deficiencies that are corrected prior to the follow-up review.

C. A review of the quality of casehandling documents issued by the Region or submitted to Washington to include:

1. Submissions to Advice and Appeals.
2. Recommendations for enforcement, miscellaneous litigation, and contempt, including the adequacy of compliance efforts.
3. Formal Settlement Stipulations.
4. Regional Director Decisions.
5. Quality of pleadings, including complaints and analyses contained in transmittal memoranda.
6. Reports on Objections and Challenges.

D. Conformity with Agency casehandling regulations, policies and procedures.

E. Reversal of decisions of the Regional Director.[4]

1. Reversals on appeals of *C* cases.
2. Reversals of pre-election RD Decisions or dismissals of *R* cases (based on other than change in policy).
3. Reversals of RD Decisions objections/challenges based on other than change in policy.

[4] The quality of the decision as well as the percentage of reversals will be considered.

CRITICAL ELEMENT THREE: (25 points)
ACHIEVEMENT OF AGENCY OBJECTIVES:

Assessment will be based on:

A. Maintenance and fostering of good relations with the public.
Conduct of, or participation in educational and labor-management relations meetings to include at least one Regionally sponsored conference with representatives of management and labor; and taking the initiative to maintain successful relations with the Bar and the public.

B. Conformance with Agency personnel and administrative regulations and policies.

C. Appropriate utilization of the Region's staff and fiscal resources. The Director will be evaluated on the extent to which any deficiency is corrected.

D. Support of other Agency Programs: Regional support and implementation of Agency programs, including General Counsel's special emphasis programs such as: the Cooperative Education Programs, the Information Officer Program, and the Inter-Regional Cooperation Program. The Director will be evaluated on the extent to which the programs are carried out.

CRITICAL ELEMENT FOUR: (25 points)
STAFF RELATIONS INCLUDING DEVELOPMENT AND TRAINING OF SUBORDINATES:

A. Staff Relations

1. EEO
The Regions should implement the National Plan and develop and implement the Local Plan in an effective, appropriate and timely manner.

2. Labor Relations
   Administers National Agreement in an effective, appropriate and timely manner.
   Administers local labor relations programs in an effective, appropriate and timely manner.
3. Sound overall Program of Staff Relations.

B. Development and Training of Subordinates.
Assessment will be based on:

1. Development and implementation of local training programs for employee and supervisory staff in accordance with established Agency guidelines.
2. Timely and accurate appraisal of subordinates in conformity with Agency guidelines, including supervisors and managers.
3. Counseling members of the supervisory and managerial staff; and insuring participation and support of managerial and supervisory development programs.

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM April 13, 1982

TO: All Regional Directors
FROM: William A. Lubbers, General Counsel

SUBJECT: Performance Factors for Critical Element I for Appraisal Period January 1, 1982 through December 31, 1982

After consultations with the Regional Directors' Committee, we have established the performance factors under Critical Element I for the current SES appraisal period. The standard for Settlement Agreements has been raised from 82 to

84 percent, and the standard for Post-Election Proceedings in which hearings are held has been changed from 90 to 95 median days.

The remaining performance factors in Critical Element I were not modified. For your convenience, the Critical Element I factors for the current appraisal period are set forth below.

Settlement Agreements: the assessment will be based upon the Region's success in achieving an 84 percent settlement rate.

Election Agreements: the assessment will be based upon the Region's success in achieving an 80 percent election agreement rate.

Regional Director Decisions (pre-election): the assessment will be based upon the Region's success in issuing its Regional Director Decisions within a median of 45 days from the filing of the petitions.

Post-Election Proceedings (*hearings*): the assessment will be based upon the Region's success in issuing its Reports, Decisions and Supplemental Decisions in post-election proceedings within a median of 95 days from the filing of the objections/challenges.

Post-Election Proceedings (*nonhearing*): the assessment will be based upon the Region's success in issuing its Reports, Decisions and Supplemental Decisions in post-election proceedings within a median of 35 days from the filing of the objections/challenges.

Elections: the assessment will be based upon the Region's success in conducting elections within a median of 50 days from the filing of the petitions.

267 NLRB No. 66

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OHIO NEW AND REBUILT PARTS, INC. AND/OR MEL'S BATTERY, INC.

and

Cases 8-CA-15128-2, 8-CA-15559, and 8-RC-12562

TRUCK DRIVERS, WAREHOUSEMEN & HELPERS UNION LOCAL NO. 908, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA (August 25, 1983)

DECISION AND ORDER

On 8 February 1983, Administrative Law Judge Donald R. Holley issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and the General Counsel filed an answering brief to the exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In the absence of exceptions thereto, Chairman Dotson and Member Hunter adopt, pro forma, the Administrative Law Judge's findings that Respondent violated Sec. 8(a)(1) of the Act by threatening to discharge employee Robert Vantilburg if he discussed his safety complaint with an inspector from the Occupational Safety and Health Administration, and thereafter by discharging Vantilburg and suspending employee Steven Leugers because, in separate instances, they refused to perform certain work they considered unsafe. The panel further notes that Leugers' warning violated Sec. 8(a)(1) of the Act, not

Judge, as modified herein.[3]

The Administrative Law Judge found that Respondent repeatedly violated Section 8(a)(1) of the Act during 1981 as follows: (1) Assistant Manager James Halter threatened to discharge employee Robert Vantilburg if he discussed his safety complaint with an inspector from the Occupational Safety and Health

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(footnote continued from previous page)

Sec. 8(a)(3) as the Administrative Law Judge found. Member Hunter notes that he does not rely on the above findings of violations in adopting, infra, the Administrative Law Judge's recommendation that a bargaining order is warranted in this case.

[3] In par. 1(h) of his recommended Order, the Administrative Law Judge uses the narrow cease-and-desist language, "in any like or related manner." We have considered this case in light of the standards set forth in Hickmott Foods, Inc., 242 NLRB 1357 (1979), and have concluded that a broad remedial order is appropriate. Accordingly, we shall modify the recommended Order and use the broad injunctive language, "in any other manner."

Administration in April; (2) after the union organizing campaign began in July, Owner Melvin Booher, on 12 August threatened the employees at its Wapakoneta, Ohio, facility, with discharge and plant closure if they selected the Union to represent them; (3) in July, Respondent discriminatorily implemented a more stringent attendance policy; (4) Booher coercively interrogated employee Vantilburg concerning his union activities in early September 1981; (5) during a meeting he conducted with five employees on 9 September (9 days before a scheduled union election), Booher threatened to fire those persons who supported the Union; threatened to discontinue Respondent's practice of giving pay advances because employees had sought union representation; and interrogated an unnamed employee concerning his union sentiments; (6) on 17 September,

Booher threatened all the employees at Respondent's Wapakoneta, Ohio, facility that he would fire the union adherents there if the Union won the election the following day; (7) later on 17 September, Booher interrogated employee Teddy Cross concerning his union activities; (8) on the election date, 18 September, Vice President Donald Miller threatened Cross with bodily harm if he did not vote against union representation; and (9) Respondent, at separate times following the election, suspended employee Steven Leugers and discharged employee Vantilburg for their protected concerted activities in refusing to perform certain work they considered unsafe.

The Administrative Law Judge also found that Respondent violated Section 8(a)(3) of the Act when it discharged employee Daniel Cable, the most vocal union activist, 4

days after the 18 September election was held. Based on these various unfair labor practices, the Administrative Law Judge further found that a bargaining order was appropriate under the standards set out in N.L.R.B. v. Gissel Packing Co., Inc., 395 U.S. 575 (1969). We affirm all but one of the violations that the Administrative Law Judge found and, for the reasons that follow, we agree that a bargaining order should issue here.

We find merit in Respondent's exception to the Administrative Law Judge's conclusion that Booher unlawfully threatened the Wapakoneta employees with possible plant closure during a meeting on 12 August. In finding the violation, the Administrative Law Judge relied on the testimony of employee Leugers who testified that Booher told the employees "something like he'd go out of business, because if

the Union came in . . . he'd have to raise his prices, to be able to pay higher wages, or whatever, and . . . [that] he's got the lowest parts in town, and if he'd have to raise them, he said he'd lose a lot of business." Vice President Miller testified, by contrast, that Booher had not threatened to close the plant during that meeting. When he appeared as a witness, Booher did not attempt to describe the 12 August meeting. However, he generally denied telling employees that he was going to close the plant.

The Administrative Law Judge concluded that he was "compelled to accept" Leugers' version of the incident since Booher and Miller had not denied Leugers' other testimony that Booher had discussed the impact of unionization on Respondent's operations. The Administrative Law Judge then found that Respondent violated Section

8(a)(1) of the Act when "Booher sought to convince employees that their selection of the Union as their bargaining agent would compel him to raise his prices, lose business, and possibly have to close the plant." As noted, we reverse this finding of an 8(a)(1) violation in Booher's remarks.

The question of the propriety of Booher's statements to employees about plant closure must be decided in light of the principles set out in N.L.R.B. v. Gissel Packing Co., supra. There, the Supreme Court established certain standards for determining whether an employer's statements about the effects of unionization are permissible. The Court stated, in pertinent part, that:

> ...an employer is free to communicate to employees any of his general views about unionism or any of his specific views about a particular union, so long

as the communications do not contain a "threat of reprisal or force or promise of benefit."[4]

In applying the Court's standard here, we emphasize that Leugers began his testimony about the 12 August meeting by stating that Booher had told the employees "something like . . ." Clearly, Leugers was uncertain as to the exact nature of Booher's remarks. Futher, Leugers' testimony then shifted so much that it is unclear whether Booher really linked the Union to higher prices that would possibly force him to close the facility. We therefore conclude that the vague statements that Leugers imprecisely attributed to Booher do not support a finding that Respondent threatened it would close the plant if employees selected the

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[4] 395 U.S. at 618.

Union to represent them. The point of this discussion with the employees was that Respondent could not afford to increase wages and might "lose a lot of business" if forced to grant such raises. Indeed, upon reviewing the record, Booher's position is confirmed by his testimony that, even in the absence of the Union, he had considered closing the plant because of adverse economic circumstances. We note that no party has questioned his comments about Respondent's financial status. Under these circumstances, we find that Leugers' testimony is too ambiguous to warrant a finding that employees were illegally threatened with possible plant closure. Accordingly, we shall dismiss that portion of the complaint which alleges that this statement of Booher violated Section

8(a)(1) of the Act.[5].

Although we have reversed the Administrative Law Judge in this one respect, we agree with his conclusion that a bargaining order is an appropriate remedy in this proceeding. However, we wish to indicate at some length our reasons for finding that this remedy is warranted by the circumstances here.

In determining whether the violations Respondent has engaged in warrant the issuance of a bargaining order, we apply the test set out in Gissel, supra, where the Court described two types of situations where such orders are appropriate: (1)

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[5] Cf. B.F. Goodrich Footwear Company, 201 NLRB 353 (1973). Member Zimmerman does not join in reversing the Administrative Law Judge's finding with regard to Booher's statement. Inasmuch as a finding of a violation is cumulative in this regard, he finds it unnecessary to pass on this issue.

"exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices; and (2) "less extraordinary" cases marked by "less pervasive" practices. [6] Thus, the Court approved the Board's use of a bargaining order in "less extraordinary" cases where the employer's unlawful conduct has a "tendency to undermine [the Union's] majority strength and impede the election processes."[7]. The Court indicated that when the unfair labor practices are less flagrant and the union at one time had majority support among the unit employees, the Board may consider

> . . .the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of

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[6] Gissel, supra at 613--614.

[7] Id. at 614.

> ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.[8]

In considering Respondent's conduct in this case, the Administrative Law Judge found, and we agree, that the unfair labor practices Respondent committed fall into the second category delineated by the Court in Gissel.

Here, as found by the Administrative Law Judge, Respondent conducted an anti union campaign in which it repeatedly engaged in coercive interrogation of its employees, threatened unit employees with discharge on three separate occasions, implemented a more stringent attendance policy, threatened to discontinue its practice of giving pay advances, and

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[8] Id. at 614--615.

threatened an employee with physical harm if he did not vote against union representation. Some of these unfair labor practices occurred during the final hours before the election. Even after the election was held, resulting in a tie vote, Respondent displayed its continuing hostility toward its employees and its willingness and ability to retaliate against them for the organizing campaign that they had initiated. Thus, Respondent discharged the most vocal union adherent, employee Daniel Cable, because of his involvement in such activities.

These violations were committed by Respondent's highest level supervisors, including its owner, vice president, and assistant manager. The positions these persons held clearly served to reinforce and increase in the minds of employees the seriousness of the threats that were

conveyed. Furthermore, the repetitious nature of the violations Respondent engaged in, e.g., the repeated threats of discharge and coercive interrogations, suggest that they were part of a general campaign to destroy employee support for the Union.

It also is highly significant that many of these violations were of an extremely serious nature. In this case, Respondent's owner twice told a gathering of the Wapakoneta employees, who comprised over three-fourths of the entire unit, that he would discharge them if they supported the Union. The widespread exposure of the unit employees to these threats clearly magnified the coercive impact they conveyed. More importantly, Respondent's subsequent unlawful discharge of Wapakoneta employee and union activist Cable ---conduct the Board and the courts have long classified as misconduct going "to the

very heart of the Act"[9] -- demonstrated to the employees that Booher had meant what he said about discharging those who supported the Union. Further, the attendance policy that Respondent implemented is a blatant example of an employer's penalizing employees for their union activities. Respondent again wielded its economic power for antiunion purposes when it threatened to discontinue the practice of giving employees pay advances. Finally, Miller's threat of bodily harm to an employee shows that Respondent would resort to extraordinary means to attempt to dissipate the Union's support. By engaging in the unfair labor practices set out here, Respondent thus has made it painfully clear to employees that the penalties for

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[9] See, e.g., N.L.R.B v. Entwistle Manufacturing Co., 120 F.2d 523, 536 (4th Cir.1941).

supporting the Union would be severe.

Respondent contends that, despite its 8(a)(1) and (3) violations here, a bargaining order is inappropriate because, inter alia, "the necessary contacts have been made ... to offer immediate and full reinstatement to ... Cable." However, assuming arguendo that such a reinstatement should be considered by the Board in determining the appropriate remedy, Respondent has offered no proof other than its assertion in its brief that Cable has, in fact, been offered reinstatement. Since the record is devoid of evidence that Cable was reinstated before the hearing was held in this case, we can only assume, if Cable has been reinstated, that Respondent has taken such action only after the Administrative Law Judge found against its interest and recommended that it be ordered to reinstate the discriminatee. Moreover,

Respondent has not indicated whether or not Cable has received his lost backpay or whether the employees are on notice that Respondent has recanted its unlawful conduct toward Cable. Accordingly, we find that Respondent's purported reinstatement of Cable has not been shown sufficient to eliminate the effects of its original unfair labor practice in discharging him.

In sum, based on the violations found herein, we conclude that the lingering effects of Respondent's past conduct render uncertain the possibility that the imposition of the conventional reinstatement and backpay orders and the posting of notices to remedy the unfair labor practices would permit a fair election to be conducted. In these circumstances, we conclude that the Union's designation as the collective-bargaining

representative by a majority of the employees having signed authorization cards provides a more reliable test of employee representation desires than would an election. Accordingly, we adopt the Administrative Law Judge's recommended Order, as modified below, requiring Respondent to bargain with the Union as the duly designated representative of a majority of its employees in the unit found appropriate for purposes of collective bargaining, effective 12 August 1981, the date that Respondent embarked on its unlawful course of conduct. [10] We therefore shall set aside the election held in Case 8--RC--12562; order that the petition therein be dismissed; and issue a bargaining order.

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[10] Beasley Energy, Inc., d/b/a Peaker Run Coal Company, Ohio Division #1, 228 NLRB 93, 97 (1977).

Amended Conclusions of Law

1. Substitute the following for Conclusions of Law 5: "5. By interrogating employees concerning their union activities; by threatening to discontinue employee benefits, including pay advances, because employees join or support the Union; by implementing a more stringent attendance policy because employees seek union representation; by threatening to discharge employees in retaliation for their supporting the Union; and by disciplining or threatening to discipline employees for engaging in protected concerted activities, Respondent has violated Section 8(a)(1) of the Act."

2. Insert the following as Conclusions of Law 6 and renumber the present Conclusions of Law 6 accordingly:

"6 By discharging employee Daniel Cable because he engaged in union activities,

Respondent has violated Section 8(a)(3) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Ohio New and Rebuilt Parts, Inc. and/or Mel's Battery, Inc., Wapakoneta and Lima, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraph 1(b) and reletter all subsequent paragraphs accordingly.

2. Substitute the following for present paragraph 1(h) and reletter as paragraph 1(g): "(g) In any other manner interfering with, restraining, or coercing

employees in the exercise of the rights guaranteed them by Section 7 of the Act."

3. Substitute the following for paragraph 2(c):

"(c) Expunge from its files any reference to the discipline handed out to employees Daniel Cable, Steven Leugers, and Robert Vantilburg, and notify these employees in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against them."

4. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges unfair labor practices not found herein.

IT IS FURTHER ORDERED that the election in Case 8--RC--12562 be, and the same hereby is, set aside, and that the petition

in Case 8--RC--12562 be, and it hereby is, dismissed.

Dated, Washington, D.C. 25 August 1983

Donald L. Dotson, Chairman

Don A. Zimmerman, Member

Robert P. Hunter, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT interrogate employees regarding their union activities or sentiments.

WE WILL NOT threaten to discontinue employees' benefits, including pay advances, because employees join or support the Union.

WE WILL NOT promulgate and institute a more stringent attendance policy because employees attempt to seek union representation.

WE WILL NOT inform employees that their receipt of previous financial assistance obligates them to abandon their support of the Union.

WE WILL NOT discharge or threaten to discharge employees because they join or

support Truck Drivers, Warehousemen & Helpers Union Local 908, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT attempt to discourage employees from protesting what they reasonably consider to be unsafe working conditions by threatening to terminate them if they file complaints with OSHA or by disciplining them for refusing to perform work which they reasonably feel is unsafe.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, recognize and bargain with Truck Drivers, Warehousemen & Helpers Union Local 908, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of

America, as the exclusive representative of all employees in the appropriate bargaining unit, and, if an understanding is reached, embody same in a signed document if asked to do so. The appropriate unit is:

> All full-time and regular part-time production and maintenance employees, truckdrivers and counter sales employees employed by the Employer at its 100 Keller Dr., Wapakoneta, Ohio, and its 459 North Main St., Lima, Ohio, facilities, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

We WILL offer Robert Vantilburg and Daniel Cable immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of pay they may have suffered due to the discrimination practiced against them, with

interest.

WE WILL expunge from our files any reference to the discipline handed out to employees Daniel Cable, Steven Leugers, and Robert Vantilburg and WE WILL notify these employees in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against them.

OHIO NEW AND REBUILT PARTS, INC., AND/OR MEL'S BATTERY, INC.

Dated _____

By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or

compliance with its provisions may be directed to the Board's Office, Anthony J. Celebrezze Federal Building, Room 1695, 1240 E. Ninth Street, Cleveland, Ohio 44199, Telephone 216-522-3126.

269 NLRB No. 35

D-1497
Canton, Oh.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CANTON HEALTH CARE CENTER, INC.

and Case 8-CA-16412

UNITED FOOD & COMMERCIAL WORKERS
UNION LOCAL 698, AFL-CIO & CLC
(March 21, 1984)

DECISION AND ORDER

Upon a charge filed on 14 January 1983 by United Food & Commercial Workers Union Local 698, AFL-CIO & CLC, herein called the Union, and duly served on Canton Health Care Center, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 8, issued a complaint on 25 February 1983, and on 1 March 1983 an amendment to the complaint, against the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting

commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, amendment to the complaint, and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on 21 October 1982, following a Board election in Case 8-RC-12700, the Union was duly certified as the exclusive collective-bargaining representative of the Respondent's employees in the unit found appropriate;[1]

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[1] Official notice is taken of the record in the representation proceeding, Case 8-RC-12700, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See LTV Electrosystems, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th

and that, commencing on or about 12 January 1985 and at all times thereafter, the Respondent has refused, and continues to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On 9 March 1983 the Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint and setting forth certain affirmative defenses.

On 16 May 1983 counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently,

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(footnote continued from previous page)

Cir. 1968); Golden Age Beverage Co., 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); Intertype Co. v. Penello, 269 F.Supp. 573 (D.C.Va. 1967); Follett Corp., 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

on 11 July 1983 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. The Respondent thereafter filed a response to the Notice to Show Cause.

The National labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

On 13 August 1982 the Acting Regional Director for Region 8 issued a Decision and Direction of Election. Thereafter, on 26 August 1982 the Respondent filed a request for review alleging, inter alia, that the Civil Service Reform Act of 1978, by its Senior Executive Service provisions, is

unconstitutional, inasmuch as it injects "a personal, pecuniary interest to the benefit of the Regional Director," into administration of the Act. On 10 September 1982 the Board issued an order denying the Respondent's request for review on the ground that it raised no substantial issues warranting review or reconsideration of Board policies.[2]

An election was conducted 14 September 1982. The tally of ballots showed that of approximately 36 eligible voters, 23 cast valid ballots for and 7 against, the Petitioner. There were no challenged ballots. The Regional Director for Region 8, on 21 October 1982, issued a Supplemental Decision and Certification of

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[2] In denying review, Member Hunter disavowed the Acting Regional Director's discussion of Allegheny General Hospital, 239 NLRB 872 (1978), which he deemed not necessary to the result in that proceeding.

Representative overruling the Respondent's objections in their entirety and certifying the Union as the bargaining representative of employees in the appropriate unit. On 3 November 1982 Respondent filed a request for review of the Regional Director's Supplemental Decision. On 30 November 1982 the Board denied the Respondent's request for review.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

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[3] See Pittsburgh Glass Co. v. NLRB, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

The Respondent is, and has been at all times material herein, an Ohio corporation

which owns and operates an intermediate care facility in Canton, Ohio. The Respondent annually derives gross revenues in excess of $100,000 and receives payment for patients from state and Federal governmental sources, including Social Security and Medicare, which funds themselves are transferred directly from points outside Ohio. We find, on the basis of the foregoing, that the Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

United Food & Commercial Workers Union Local 698, AFL-CIO & CLC is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time service and maintenance employees, including nurses aides, laundry employees, housekeeping employees and maintenance employees employed at the Employer's 1223 North Market, Canton, Ohio facility, but excluding licensed practical nurses, all technical employees, dietary employees, office clerical employees, and professional employees, guards and supervisors as defined in the Act.

On 14 September 1982 a majority of the employees of the Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 8 designated the Union as their representative for the purpose of collective bargaining with the Respondent.

The Union was certified as the

collective bargaining representative of the employees in said unit 21 October 1982, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and the Respondent's Refusal

Commencing on or about 19 December 1982 and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective bargaining representative of all the employees in the above-described unit. Commencing on or about 12 January 1983 and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the

Respondent has, since 12 January 1983 and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with its operations described in Section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, on request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See Mar-Jac Poultry Co., 136 NLRB 785 (1962); Lamar Hotel, 140 NLRB

226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); Burnett Construction Co., 149 NLRB 1419, 1421 (1964), enfd. 350 F. 2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Canton Health Care Center, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food & Commercial Workers Union Local 698, AFL-CIO& CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time service and maintenance employees, including nurses aides, laundry employees, housekeeping employees and maintenance employees employed at the Employer's 1223

North Market, Canton, Ohio facility, but excluding licensed practical nurses, all technical employees, dietary employees, office clerical employees, and professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since 21 October 1982 the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about 12 January 1983, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the

employees of the Respondent in the appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and cocering, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board oders that the Respondent, Canton Health

Care Center, Inc., Canton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Food & Commercial Workers Union Local 698, AFL-CIO & CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time service and maintenance employees, including nurses aides, laundry employees, housekeeping employees and maintenance employees employed at the Employer's 1223 North Market, Canton, Ohio facility, but excluding licensed practical nurses, all technical employees, dietary employees, office clerical employees, and professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights

guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) On request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other items and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Canton, Ohio facility copies of the attached notice marked "Appendix".[4] Copies of said notice, on

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[4] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED PURSUANT TO AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

forms provided by the Regional Director for Region 8, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C.
21 March 1984

Donald L. Dotson, Chairman

Don A. Zimmerman, Member

Robert P. Hunter, Member

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Foods & Commercial Workers Union Local 698, AFL-CIO & CLC as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and

other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time service and maintenance employees, including nurses aides, laundry employees, housekeeping employees and maintenance employees employed at the Employer's 1223 North Market, Canton, Ohio facility, but excluding licensed practical nurses, all technical employees, dietary employees, office clerical employees, and professional employees, guards and supervisors as defined in the Act.

CANTON HEALTH CARE CENTER, INC.

_____
(Employer)

Dated _____

By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or

covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Anthony J. Celebrezze Federal Building, Room 1695, 1240 E. Ninth Street, Cleveland, Ohio 44199, Telephone 216-942-3733.

268 NLRB No. 79

D-1298
Tallmadge, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COLONIAL GARDENS CARE CENTER, INC.

and Case 8-CA-16093-2

UNITED FOODS & COMMERCIAL WORKERS
UNION LOCAL 698, AFL-CIO
(January 24, 1984)

DECISION AND ORDER

Upon a charge filed by the Union 20 September 1982, the General Counsel of the National labor Relations Board issued a complaint 10 November 1982 against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 28 July 1982, following a Board election in Case 8-RC-12675, the Union was certified as the exclusive collective-bargaining representative of the Company's employees in the unit found appropriate. (Official

notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed.Reg. 45922 (1981); Frontier Hotel, 265 NLRB No. 46 (Nov. 9, 1982)). The complaint further alleges that since 30 July 1982 the Company has refused to bargain with the Union. On 17 November 1982 the Company filed its answer admitting in part and denying in part the allegations in the complaint.

On 25 April 1983 the General Counsel filed a Motion for Summary Judgment. On 28 April 1983 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed a response.

The National Labor Relations Board has delegated its authority in this proceeding

to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer to the complaint, the Respondent denies the Union's status as the exclusive collective-bargaining representative of the employees in the unit found appropriate in Case 8-RC-12675. Respondent's answer also contests the validity of the Union's certification. Specifically, it asserts that the Union sent false and defamatory information to employees during the campaign, posted "false propaganda", and improperly waived initiation fees. Respondent further contends, both in its answer and the response to Notice to Show Cause, that the Regional Director did not properly investigate the Respondent's election objections, and that the Senior Executive Service has rendered unconstitutional any actions by the Regional Director (such as

ordering the election, supervising the election, reporting on the election, issuing findings and making recommendations, and processing the instant unfair labor practice case). The General Counsel asserts that the Respondent seeks to relitigate issues that were raised or could have been raised and decided in the representation case. We agree with the General Counsel.

Our review of the record, including the record in Case 8-RC-12675, reveals that pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on 5 May 1982 among employees in the stipulated unit. The tally of ballots showed that of approximately 118 eligible voters, 69 cast ballots for, and 12 against, the Union, with 5 challenged ballots. The challenged ballots were not sufficient to affect the results of the

election. On 11 May 1982, the Respondent filed timely objections to conduct affecting the results of the election alleging, inter alia, that the Union made material misrepresentations of facts, distributed defamatory material to employees, and improperly waived initiation fees. After conducting an investigation, the Regional Director for Region 8 issued his Report on Objections in which he recommended that the Respondent's objections be overruled. The Respondent then filed with the Board exceptions to the Regional Director's report. In its exceptions the Respondent contended, inter alia, that the Regional Director erred in failing to conduct an evidentiary hearing on the election objections, and in finding that certain campaign literature the Union had distributed and a document a certain employee had posted did not warrant setting

aside the election. On 28 July 1982, the Board issued a Decision and Certification of Representative in which it adopted the Regional Director's recommended disposition of the objections, and certified the Union as the collective-bargaining representative of the employees in the stipulated unit.[1]

[1] Respondent's Objections 1, 2, and 4 in the underlying representation case alleged, inter alia, that the Union made material misrepresentations of fact during the campaign. The Board adopted the Regional Director's findings that the alleged misrepresentations were not objectionable under the standard set forth in General Knit of California, 239 NLRB 619 (1978), and Hollywood Ceramics Co., 140 NLRB 221 (1962). After the Union was certified, the Board issued its decision in Midland National Life Insurance Co., 263 NLRB 127, 133 (1982), overruling General Knit and Hollywood Ceramics, and held that the Board "will no longer probe into the truth or falsity of the parties' campaign statements, and that [the Board] will not set elections aside on the basis of misleading campaign statements." In keeping with fn. 24 of that opinion, stating that the new standard would be applied "to all pending cases in whatever stage," we conclude that Respondent's misrepresentation allegations are without merit on their face.

It thus appears that the Respondent is attempting to raise issues that were raised in the underlying representation case.

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See Pittsburgh Glass Co. v. NLRB, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

All issues raised by the Company were or could have been litigated in the prior representation proceeding.[2] The Company

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[2] The Respondent's contention regarding the impact of the Senior Executive Service upon the Regional Director's actions was raised for the first time in its answer to the complaint and

does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Company has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly we grant the Motion for Summary Judgment.

(footnote continued from previous page)

response to the Notice to Show Cause in this proceeding. This issue could have been litigated in the prior representation proceeding and the Respondent does not contend that it has newly discovered or previously unavailable evidence concerning this matter. Accordingly, we find that this issue may not be litigated in this unfair labor practice proceeding. We note that even if the Respondent's contentions were properly litigated in this proceeding they would be found lacking in merit. See French Hospital Medical Center, 254 NLRB 711 fn. 3 (1981).

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

The Company, an Ohio corporation, operates a nursing care facility in Tallmadge, Ohio, where it annually derives gross revenues in excess of $100,000, and receives goods valued in excess of $5000 directly from points located outside the State of Ohio. We find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Certification

Following the election held 5 May 1982 the Union was certified 28 July 1982 as the collective-bargaining representative of the

employees in the following appropriate unit:

> All full-time and permanent part-time nurses aides, laundry employees, housekeping employees and maintenance employees employed at the Employer's 563 Colony Park Drive, Tallmadge, Ohio location, but excluding all casual and temporary employees, dietary employees, maintenance supervisor, technical employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

B. Refusal to Bargain

Since 30 July 1982 the Union has requested the Company to bargain, and since 30 July 1982 the Company has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

By refusing on and after 30 July 1982 to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Company has engaged in unfair labor practices affecting commerce within the

meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. Mar-Jac Poultry Co., 136 NLRB 785 (1962); Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); Burnett Construction Co., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57

(10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Colonial Gardens Care Center, Inc., Tallmadge, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Food & Commercial Workers Union Local 698, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the

Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and permanent part-time nurses aides, laundry employees, housekeping employees and maintenance employees employed at the Employer's 563 Colony Park Drive, Tallmadge, Ohio location, but excluding all casual and temporary employees, dietary employees, maintenance supervisor, technical employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Post at its facility in 563 Colony Park Drive, Tallmadge, Ohio, copies of the attached notice marked "Appendix."[3] Copies of the notice, on

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[3] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. 24 January 1984

Don A. Zimmerman, Member

Robert P. Hunter Member

Patricia Diaz Dennis Member

(SEAL) National Labor Reltions Board

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with United Food & Commercial Workers Union Local 698, AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the

bargaining unit:

All full-time and permanent part-time nurses aides, laundry employees, housekeping employees and maintenance employees employed at the Employer's 563 Colony Park Drive, Tallmadge, Ohio location, but excluding all casual and temporary employees, dietary employees, maintenance supervisor, technical employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

COLONIAL GARDENS CARE CENTER, INC.

_____

(Employer)

Dated _____

By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting

and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Anthony J. Celebrezze Federal Building, Room 1695, 1240 E. Ninth Street, Cleveland, Ohio 44199, Telephone 216-942-3733.

PERTINENT PROVISIONS OF THE SENIOR EXECUTIVE SERVICE

TITLE 5, UNITED STATES CODE
SUBCHAPTER II - THE SENIOR EXECUTIVE SERVICE

Sec. 3131. The Senior Executive Service

It is the purpose of this subchapter to establish a Senior Executive Service to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality. The Senior Executive Service Shall be administered so as to-

(1) provide for a compensation system, including salaries, benefits and incentives and for other conditions of employment, designed to attract and retain highly competent senior exectutives;

(2) ensure that compensation, retention and tenure are contingent on executive success which is measured on the basis of individual and organizational performance

(including such factors as improvements, inefficiency, productivity, quality of work or service, cost efficiency, and timeliness of performance and success in meeting equal employment opportunity goals);

(3) assure that senior executives are accountable and responsible for the effectiveness and productivity of employees under them;

(4) recognize exceptional accomplishment;

(5) enable the head of an agency to reassign senior executives to best accomplish the agency's mission;

(6) provide for severance pay, early retirement, and replacement assistance for senior executives who are removed from the Senior Executive Service ofr nondisciplinary reasons;

(7) protect senior executives from arbitrary or capricious actions;

(8) provide for program continuity and policy advocacy in the management of public programs;

(9) maintain a merit personnel system free of prohibited personnel practices;

(10) ensure accountability for honest, economical and efficient Government;

(11) ensure compliance with all applicable civil service laws, rules, and regulations, including those related to equal employment opportunity, political activity, and conflicts of interest;

(12) provide for the initial and continuing systematic development of highly competent senior executives;

(13) provide for an executive system which is guided by the public interest and free from improper political interference; and (14) appoint career executives to fill Senior Executive Service positions to the extent practicable, consistent with the

effective and efficient implementation of agency policies and responsibliities.

Sec.3132. Definitions and exclusions

(a) For the purpose of this subchapter-

(1) "agency" means an Executive agency, except a Government corporation and the General Accounting Office, but does not include-

(A) any agency or unit thereof excluded from coverage by the President under subsection (c) of this section; or

(B) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and, as determined by the President, an Executive agency, or unit thereof, whose principal function is the conduct of foreign intelligence or counterintelligence activites; or

(C) the Federal Election Commission;

(2) "Senior Executive Service position" means any position in an agency which is in GS-16, 17, or 18 of the General Schedule or in level IV or V of the Executive Schedule, or an equivalent position, which is not required to be filled by an appointment by the President by and with the advice and consent of the Senate, and in which an employee-

(A) directs the work of an organizational unit;

(B) is held accountable for the success of one or more specific programs or projects;

(C) monitors progress toward organizational goals and periodically evaluates and makes appropriate adjustments to such goals;

(D) supervises the work of employees other than personal assistants; or

(E) otherwise exercises important

policy-making, policy-determining, or other executive functions; but does not include--

(i) any position in the Foreign Service of the United States;

(ii) an administrative law judge position under section 3105 of this title; or

(iii) any position in the Drug Enforcement Administration which is excluded from the competitive service under section 201 of the Crime Control Act of 1976 (5 U.S.C. 5108 note; 90 Stat. 2425);

(3) "senior executive" means a member of the Senior Executive Service;

(4) "career appointee" means an individual in a Senior Executive Service position whose appointment to the position or previous appointment to another Senior Executive Service position was based on approval by the Office of Personnel Management of the executive qualifications

of such indivdual;

(5) "limited term appointee" means an individual appointed under a nonrenewable appointment for a term of 3 years or less to a Senior Executive Service position the duties of which will expire at the end of such term;

(6) "limited emergency appointee" means an individual appointed under a nonrenewable appointment, not to exceed 18 months, to a Senior Executive Service position established to meet a bona fide, unanticipated, urgent need;

(7) "noncareer appointee" means an individual in a Senior Executive Service position who is not a career appointee, a limited term, or a limited emergency appointee;

(8) "career reserved position" means a position which is required to be filled by a career appointee and which is designated

under subsection (b) of this section; and

(9) "general position" means any position, other than a career reserved position, which may be filled by either a career appointee, noncareer appointee, limited emergency appointee, or limited term appointee.

(b)(1) For the purpose of paragraph (8) of subsection (a) of this section, the Office shall prescribe the criteria and regulations governing the designation of career reserved positions. The criteria and regulations shall provide that a position shall be designated as a career reserved position only if the filling of the position by a career appointee is necessary to ensure impartiality, or the public's confidence in the impartiality, of the Government. The head of each agency shall be responsible for designating career reserved positions in such agency in

accordance with such criteria and regulations.

(2) The Office shall periodically review general positions to determine whether the positions should be designated as career reserved. If the Office determines that any such position should be so designated, it shall order the agency to make the designation.

(3) Notwithstanding the provisions of any other law, any position to be designated as a Senior Executive Service position (except a position in the Executive Office of the President) which--

(A) is under the Executive Schedule, or for which the rate of basic pay is determined by reference to the Executive Schedule, and

(B) on the day before the date of the enactment of the Civil Service Reform Act of 1978 was specifically required under

section 2102 of this title or otherwise required by law to be in the competitive service, shall be designated as a career reserved position if the position entails direct responsibility to the public for the management or operation of particular government programs or functions.

(4) Not later than March 1 of each year, the head of each agency shall publish in the Federal Register a list of positions in the agency wich were career reserved positions during the preceding calendar year.

(c) An agency may file an application with the Office setting forth reasons why it, or a unit thereof, should be excluded from the coverage of this subchapter. The Office shall---

(1) review the application and stated reasons,

(2) undertake a review to determine

whether the agency or unit should be excluded from the coverage of this subchapter, and

(3) upon completion of its review, recommend to the President whether the agency or unit should be excluded from the coverage of this subchapter.

If the Office recommends that an agency or unit thereof be excluded from the coverage of this subchapter, the President may, on written determination, make the exclusion for the period determined by the President to be appropriate.

(d) Any agency or unit which is excluded from coverage under subsection(c) of this section shall make a sustained effort to bring its personnel system into conformity with the Senior Executive Service to the extent practicable.

(e) The Office may at any time recommend to the President that any

exclusion previously granted to an agency or unit thereof under subsection (c) of this section be revoked. Upon recommendation of the Office, the President may revoke, by written determination, any exclusion made under subsection (c) of this section.

(f) If--

(1) any agency is excluded under subsection (c) of this section, or

(2) any exclusion is revoked under subsection (e) of this section,

the Office shall, within 30 days after the action, transmit to the Congress written notice of the exclusion or revocation.

SUBCHAPTER V
REMOVAL, REINSTATEMENT, AND GUARANTEED PLACEMENT IN THE SENIOR EXECUTIVE SERVICE

Sec. 3591. Definitions

For the purpose of this subchapter, "agency", "Senior Executive Service

position", senior executive," "career appointee", "limited term appointee", "limited emergency appointee", "noncareer appointee", and "general position" have the meanings set forth in section 3132(a) of this title.

Sec. 3592. Removal from the Senior Executive Service

(a) Except as provided in subsection (b) of this section, a career appointee may be removed from the Senior Executive Service to a civil service position outside of the Senior Executive Service---

(1) during the 1-year period of probation under section 3393(d) of this tile, or

(2) at any time for less than fully successful executive performance as determined under subchapter II of chapter 43 of this title,

except that in the case of a removal under

pagargraph (2) of this subsection the career appointee shall, at least 15 days before the removal, be entitled, upon request, to an informal hearing before an official designated by the Merit Systems Protection Board at which the career appointee may appear and present arguments, but such hearing shall not give the career apointee the right to initiate an action with the Board under section 7701 of this title, nor need the removal action be delayed as a result of the granting of such hearing.

(b)(1) Except as provided in paragraph (2) of this subsection, a career apointee in an agency may not be involuntarily removed---

(A) within 120 days after an appointment of the head of the agency; or

(B) within 120 days after the appointment in the agency of the career

appointee's most immediate supervisor who--

(i) is a noncareer apointee; and

(ii) has the authority to remove the career appointee.

(2) Paragraph (1) of this does not apply with respect to--

(A) any removal under section 4314(b)(3) of this title; or

(B) any disciplinary action initiated before an appointment referred to in paragraph (1) of this subsection.

(c) A limited emergency appointee, limited term appointee, or noncareer appointee may be removed from the service at any time.

SUBCHAPTER II
PERFORMANCE APPRAISAL IN THE SENIOR EXECUTIVE SERVICE

Sec. 4311. Definitions

For the purpose of this subchapter, "agency", "senior executive", and "career

appointee" have the meanings set forth in section 3132(a) of this title.

Sec. 4312. Senior Executive Service performance appraisal systems.

(a) Each agency shall, in accordance with standards established by the Office of Personnel Management, develop one or more performance appraisal systems designed to--

(1) permit the accurate evaluation of performance in any position on the basis of criteria which are related to the position and which specify the critical elements of the position;

(2) provide for systematic appraisals of performance of senior executives;

(3) encourage excellence in performance by senior executives; and

(4) provide a basis for making eligibility determinations for retention in the Senior Executive Service and for Senior

Executive Service performance awards.

(b) Each performance appraisal system established by an agency under subsection (a) of this section shall provide-

(1) that, on or before the beginning of each rating period, performance requirements for each senior executive in the agency are established in consultation with the senior executive and communicated to the senior executive;

(2) that written appraisals of performance are based on the individual and organizational performance requirements established for the rating period involved; and

(3) that each senior executive in the agency is provided a copy of the appraisal and rating under section 4314 of this title and is given an opportunity to respond in writing and have the rating reviewed by an employee or (with the

consent of the senior executive) a commissioned officer in the uniformed services serving on active duty, in a higher level in the agency before the rating becomes final.

(c)(1) The Office shall review each agency's performance appraisal system under this section, and determine whether the agency performance appraisal system meets the requirements of this subchapter.

(2) The Comptroller General shall from time to time review performance appraisal systems under this section to determine the extent to which any such system meets the requirements under this subchapter and shall periodically report its findings to the Office and to each House of the Congress.

(3) If the Office determines that an agency performance appraisal system does not meet the requirements under this

subchapter (including regulations prescribed under section 4315), the agency shall take such corrective action as may be required by the Office.

(d) A senior executive may not appeal any appraisal and rating under any performance appraisal system under this section.

Sec. 4313. Criteria for performance appraisals.

Appraisals of performance in the Senior Executive Service shall be based on both individual and organizational performance, taking into account such factors as-

(1) improvements in efficiency, productivity, and quality of work or service, including any significant reduction in paperwork;

(2) cost efficiency;

(3) timeliness of performance;

(4) other indications of the

effectiveness, productivity, and performance quality of the employees for whom the senior executive is responsible; and

(5) meeting affirmative action goals and achievement of equal employment opportunity requirements.

Sec. 4314. Ratings for performance appraisals.

(a) Each performance appraisal system shall provide for annual summary ratings of levels of performance as follows:

(1) one or more fully successful levels,

(2) a minimally satisfactory level, and

(3) an unsatisfactory level.

(b) Each performance appraisal system shall provide that-

(1) any appraisal and any rating under such system-

(A) are made only after review and evaluation by a performance review board established under subsection (c) of this section;

(B) are conducted at least annually, subject to the limitation of subsection (c)(3) of this section;

(C) in the case of a career appointee, may not be made within 120 days after the beginning of a new Presidential administration; and

(D) are based on performance during a performance appraisal period the duration of which shall be determined under guidelines established by the Office of Personnel Management, but which may be terminated in any case in which the agency making an appraisal determines that an adequate basis exists on which to appraise and rate the senior executive's performance;

(2) any career appointee receiving a

rating at any of the fully successful levels under subsection (a)(1) of this section may be given a performance award under section 5384 of this title;

(3) any senior executive receiving an unsatisfactory rating under subsection (a)(3) of this section shall be reassigned or transferred within the Senior Executive Service, or removed from the Senior Executive Service, but any senior executive who receives 2 unsatisfactory ratings in any period of 5 consecutive years shall be removed from the Senior Executive Service; and

(4) any senior executive who twice in any period of 3 consecutive years receives less than fully successful ratings shall be removed from the Senior Executive service.

(c)(1) Each agency shall establish, in accordance with regulations prescribed by the Office, one or more performance review

boards, as appropriate. It is the function of the boards to make recommendations to the appropriate appointing authority of the agency relating to the performance of senior executive in the agency.

(2) The supervising official of the senior executive shall provide to the performance review board, an initial appraisal of the senior executive's performance. Before making any recommendation with respect to the senior executive, the board shall review any response by the senior executive to the initial appraisal and conduct such further review as the board finds necessary.

(3) Performance appraisals under this subchapter with respect to any senior executive shall be made by the appointing authority only after considering the recommendations by the performance review board with respect to such senior executive

under paragraph (1) of this subsection.

(4) Members of performance review boards shall be appointed in such a manner as to assure consistency, stability, and objectivity in performance appraisal. Notice of the appointment of an individual to serve as a member shall be published in the Federal Register.

(5) In the case of an appraisal of a career appointee, more than one-half of the members of the performance review board shall consist of career appointees. The requirement of the preceding sentence shall not apply in any case in which the Office determines that there exists an insufficient number of career appointees available to comply with the requirement.

(d) The Office shall include in each report submitted to each House of the Congress under section 3135 of this title a report of-

(1) the performance of any performance review board established under this section,

(2) the number of individuals removed from the Senior Executive Service under subchapter V of chapter 35 of this title for less that fully successful executive performance, and

(3) the number of performance awards under section 5384 of this title.

Sec. 4507. Awarding of ranks in the Senior Executive Service.

(a) For the purpose of this section, "agency", "senior executive", and "career appointee" have the meanings set forth in section 3132(a) of this title.

(b) Each agency shall submit annually to the Office recommendations of career appointees in the agency to be awarded the rank of Meritorious Executive or Distinguished Executive. The

recommendations may take into account the individual's performance over a period of years. The Office shall review such recommendations and provide to the President recommendations as to which of the agency recommended appointees should receive such rank.

(c) During any fiscal year, the President may, subject to subsection (d) of this section, award to any career appointee recommended by the Office the rank of-

(1) Meritorious Executive, for sustained extraordinary accomplishment. A career appointee awarded a rank under paragraph (1) or (2) of this subsection shall not be entitled to be awarded that rank during the following 4 fiscal years.

(d) During any fiscal year-

(1) the number of career appointees awarded the rank of Meritorious Executive may not exceed 5 percent of the Senior

Executive Service; and

(2) the number of career appointees awarded the rank of Distinguished Executive may not exceed 1 percent of the Senior Executive Service.

(e)(1) Receipt by a career appointee of the rank of Meritorious Executive entitles such individual to a lump-sum payment of $10,000, which shall be in addition to the basic pay paid under section 5382 of this title or any award paid under section 5384 of this title.

(2) Receipt by career appointee of the rank of Distinguished Executive entitles the individual to a lump-sum payment of $20,000, which shall be in addition to the basic pay paid under section 5382 of this title or any award paid under section 5384 of this title.

Sec. 5318. Adjustments in rates of pay. Effective at the beginning of the first

applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5305 of this title in the rates of pay under the General Schedule, the annual rate of pay for positions at each level of the Executive Schedule shall be adjusted by an amount, rounded to the nearest multiple of $100 (or if midway between multiples of $100, to the next higher multiple of $100), equal to the percentage of such annual rate of pay which corresponds to the overall average percentage (as set forth in the report transmitted to the Congress under such section 5305) of the adjustment in the rates of pay under the General Schedule.

SUBCHAPTER VIII-PAY FOR THE SENIOR EXECUTIVE SERVICE

Sec. 5381. Definitions

For the purpose of this subchapter, "agency", "Senior Executive Service

position", and "senior executive" have the meanings set forth in section 3132(a) of this title.

Sec. 5382. Establishment and adjustment of rates of pay for the Senior Executive Service.

(a) There shall be 5 or more rates of basic pay for the Senior Executive Service, and each senior executive shall be paid at one of the rates. The rates of basic pay shall be initially established and thereafter adjusted by the President subject to subsection (b) of this section.

(b) In setting rates of basic pay, the lowest rate for the Senior Executive Service shall not be less than the minimum rate of basic pay payable for GS-16 of the General Schedule and the highest rate shall not exceed the rate for level IV of the Executive Shcedule. The payment of the rates shall not be subject to the pay

limitation of section 5308 of this title.

(c) Subject to subsection (b) of this section, effective at the begining of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5305 of this tile in the rates of pay under the General Schedule, each rate of basic pay for the Senior Executive Service shall be adjusted by an amount determined by the President to be appropriate. The adjusted rates of basic pay for the Senior Executive Service shall be included in the report transmitted to the Congress by the President under section 5305(a)(3) or (c)(1) of this title.

(d) The rates of basic pay that are established and adjusted under this section shall be printed in the Federal Register and shall supersede any prior rates of basic pay for the Senior Executive Service.

Sec. 5383. Setting individual senior executive pay.

(a) Each appointing authority shall determine, in accordance with criteria established by the Office of Personnel Management, which of the rates established under section 5382 of this title shall be paid to each senior executive under such appointing authority.

(b) In no event may the aggregate amount paid to a senior executive during any fiscal year under sections 4507, 5382, 5384 and 5948 of this title exceed the annual rate payable for positions at level I of the Executive Schedule in effect at the end of such fiscal year.

(c) Except for any pay adjustment under section 5382 of this title, the rate of basic pay for any senior executive may not be adjusted more than once during any 12-month period.

(d) The rate of basic pay for any career appointee may be reduced from any rate of basic pay to any lower rate of basic pay only if the career appointee receives a written notice of the reduction at least 15 days in advance of the reduction.

Sec. 5384. Performance awards in the Senior Executive Service.

(a)(1) To encourage excellence in performance by career appointees, performance awards shall be paid to career appointees in accordance with the provisions of this section.

(2) Such awards shall be paid in a lump sum and shall be paid in addition to the basic pay paid under section 5382 of this title or any award paid under section 4507 of this title.

(b)(1) No performance award under this section shall be paid to any career

appointee whose performance was determined to be less than fully successful at the time of the appointee's most recent performance appraisal and rating under subchapter II of chapter 43 of this title.

(2) The amount of a performance award under this section shall be determined by the agency head but may not exceed 20 percent of the career appointee's rate of basic pay.

(3) The number of career appointees in any agency paid performance awards under this section during any fiscal year may not exceed 50 percent of the number of Senior Executive Service positions in such agency. This paragraph shall not apply in the case of any agency which has less than 4 Senior Executive Service positions.

(c) Performance awards paid by any agency under this section shall be based on recommendations by performance review boards established by such agency under

section 4314 of this title.

(d) The Office of Personnel Management may issue guidance to agencies concerning the proportion of Senior Executive Service salary expenses that may be appropriately applied to payment of performance awards and the distribution of awards.

PERTINENT PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT TITLE 29, UNITED STATES CODE

Sec. 159. Representatives and elections -- Exclusive representatives; employees' adjustment of grievances directly with employer.

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment

is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

Determination of bargaining unit by Board

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion

in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Hearings on questions affecting commerce; rules and regulations

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board --

(a) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which was been certified or is being currently recognized by their employer as the bargaining representative, is no longer a

representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individual or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and

provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

Petition for enforcement or review; transcript

(d) Whenever an order of the Board made pursuant to section 160 (c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Secret ballot; limitation of elections

(e) (1) Upon the filing with the Board,

by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a) (3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

Sec. 160. Prevention of unfair labor practices -- Powers of Board generally

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice

(listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment of prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by

reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States

under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

Reduction of testimony to writing; findings and orders of Board

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to

take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied

with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if

no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

Modification of findings or orders prior to filing record in court

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

Petition to court for enforcement of order; proceedings; review of judgment

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to

which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in

part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the

record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Review of final order of
Board on petition to court

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon

the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Institution of court proceedings as stay of Board's order

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by

the court, operate as a stay of the Board's order.

Jurisdiction of courts unaffected by limitations prescribed in sections 101 to 115 of this title

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101 to 115 of this title.

Injunctions

(j) The Board shall have power, upon issuance of a complaint a provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court,

within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Hearings on jurisdicitional strikes

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that

such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A),(B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b) (7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like

character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relef or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be

issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 158(b)(7) of this title if a charge against the employer under section 158(a)(2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an

opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b)(4)(D) of this title.

Priority of cases

(m) Whenever it is charged that any

person has engaged in an unfair labor practice within the meaning of subsection (a) (3) or (b)(2) of section 158 of this title, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (1) of this section.

PERTINENT PROVISIONS OF THE RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD, SERIES 8, AS AMENDED

TITLE 29, CODE OF FEDERAL REGULATIONS

SUBPART B -- UNFAIR LABOR PRACTICE CASES UNDER SECTION 10(a) to (i) OF THE ACT AND TELEGRAPH MERGER ACT CASES

Sec. 101.2 Initiation of unfair labor practice cases. -- The investigation of an alleged violation of the National Labor Relations Act is initiated by the filing of a charge, which must be in writing and signed, and must either be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. The charge is filed with the regional director for the region in which the alleged violations have occurred or are occurring. A blank form for filing such charge is supplied by the regional office

upon request. The charge contains the name and address of the person against whom the charge is made and a statement of the facts constituting the alleged unfair labor practices.

Sec. 101.4 Investigation of charges. -- When the charge is received in the regional office it is filed, docketed, and assigned a case number. The regional director may cause a copy of the charge to be served upon the person against whom the charge is made, but timely service of a copy of the charge within the meaning of the proviso to section 10(b) of the act is the exclusive responsibility of the charging party and not of the general counsel or his agents. The regional director requests the person filing the charge to submit promptly evidence in its support. As part of the the investigation hereinafter mentioned, the person against

whom the charge is filed, hereinafter called the respondent, is asked to submit a statement of his position in respect to the allegations. The case is assigned for investigation to a member of the field staff, who interviews representatives of the parties and other persons who have knowledge as to the charges, as is deemed necessary. In the investigation and in all other stages of the proceedings, charges alleging violation of section 8(b)(4)(A), (B), and (C), charges alleging violation of Section 8(b)(4)(D) in which it is deemed appropriate to seek-injunctive relief under Section 10(l) of the act, and charges alleging violations of Section 8(b)(7) or 8(e) are given priority over all other cases in the office in which they are pending except cases of like character; and charges alleging violation of Section 8(a)(3) or 8(b)(2) are given priority over

all other cases except cases of like character and cases under section 10(l) of the act. The regional director may in his discretion dispense with any portion of the investigation described in this section as appears necessary to him in consideration of such factors as the amount of time necessary to complete a full investigation, the nature of the proceeding, and the public interest. After investigation, the case may be disposed of through informal methods such as withdrawal, dismissal, or settlement; or, the case may necessitate formal methods of disposition. Some of the informal methods of handling unfair labor practice cases will be stated first.

Sec. 101.7 Settlements. -- Before any complaint is issued or other formal action taken, the regional director affords an opportunity to all parties for the submission and consideration of facts,

argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally prehearing conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The regional office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the regional director, provide for an appeal to the general counsel, as described in section 101.6, by a complainant who will not join in a settlement or adjustment deemed adequate by the regional director. Proof of compliance is obtained by the regional director before the case is closed. If the respondent fails to perform his obligations under the

informal agreement, the regional director may determine to institute formal proceedings.

Sec. 101.8 Complaints. -- If the charge appears to have merit and efforts to dispose of it by informal adjustment are unsuccessful, the regional director institutes formal action by issuance of a complaint and notice of hearing. In certain types of cases, involving novel and complex issues, the regional director, at the discretion of the general counsel, must submit the case for advice from the general counsel before issuing a complaint. The complaint, which is served on all parties, sets forth the facts upon which the Board bases its jurisdiction and the facts relating to the alleged violations of law by the respondent. The respondent must file an answer to the complaint within 10 days of its receipt, setting forth a

statement of its defense.

Sec. 101.20 Formal hearing. -- (a) If no informal adjustment of the question concerning representation has been effected and it appears to the regional director that formal action is necessary, the regional director will institute formal proceedings by issuance of a notice of hearing on the issues, which is followed by a decision and direction of election or dismissal of the case. In certain types of cases, involving novel or complex issues, the regional director may submit the case for advice to the Board before issuing notice of hearing.

(b) The notice of hearing, together with a copy of the petition, is served upon the unions and employer filing or named in the petition and upon other known persons or labor organizations claiming to have been designated by employees involved in

the proceeding.

(c) The hearing, usually open to the public, is held before a hearing office who normally is an attorney or field examiner attached to the regional office but may be another qualified official. The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case. The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions. In most cases a substantial number of the relevant facts are undisputed and stipulated. The parties are permitted to argue orally on the record before the hearing office.

SUBPART B - PROCEDURE UNDER SECTION 10(a) TO (i) OF THE ACT FOR THE PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 102.9 Who may file; withdarawal and dismissal. - A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person. Any such charge may be withdrawn, prior to the hearing, only with the consent of the regional director with whom such charge was filed; at the hearing and until the case has been transferred to the Board pursuant to section 102.45, upon motion, with the consent of the administrative law judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to section 102.45, upon motion, with the consent of the Board. Upon withdrawal of any charge, any complaint based thereupon shall be dismissed by the regional director issuing the complaint, the administrative

law judge designated to conduct the hearing, or the Board.

Sec. 102.11 Forms; jurat; or declaration. -- Such charges shall be in writing and signed, and either shall be sworn to before a notary public. Board agent, or other person duly authorized by law to administer oaths and take acknowledgements or shall contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. Three additional copies of such charge shall be filed together with one copy for each additional charged party named.

Complaint

Sec. 102.15 When and by whom issued; contents; service. -- After a charge has been filed, if it appears to the regional director that formal proceedings in respect

thereto should be instituted, he shall issue and cause to be served upon all the other parties a formal complaint in the name of the Board stating the unfair labor practices and containing a notice of hearing before an administrative law judge at a place therein fixed and at a time not less than 10 days after the service of the complaint. The complaint shall contain (1) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (2) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed.

Sec. 102.25 Ruling on motions. -- An administrative law judge designated by the chief administrative law judge, by the

deputy chief judge in San Francisco, California, by the associate chief judge in New York, New York, or by the associate chief judge in Atlanta, Georgia, as the case may be,shall rule on all prehearing motions (except as provided in section 102.16, 102.22, 102.29, and 102.50), and all such rulings and orders shall be issued in writing and a copy served on each of the parties. The administrative law judge designated to conduct the hearing shall rule on all motions after opening of the hearing (except as provided in section 102.47.), and any orders in connection therewith, if announced at the hearing, shall be stated orally on the record; in all other cases the administrative law judge shall issue such rulings and orders in writing and shall cause a copy of the same to be served on each of the parties, or shall make his ruling in his decision.

Whenever the administrative law judge has reserved his ruling on any motion, and the proceeding is therafter transferred to and continued before the Board pursuant to section 102.50, the Board shall rule on such motion.

SUBPART C -- PROCEDURE UNDER SECTION 9(c) OF THE ACT FOR THE DETERMINATION OF QUESTIONS CONCERNING REPRESENTATION OF EMPLOYEES AND FOR CLARIFICATION OF BARGAINING UNITS AND FOR AMENDMENT OF CERTIFICATIONS UNDER SECTION 9(b) OF THE ACT

Sec. 102.60 Petitions. (a) Petition for certification or decertification; who may file, where to file; withdrawal. -- A petition for investigation of a question concerning representation of employees under paragraphs (1) (A) (i) and (1) (B) of section 9(c) of the act (hereinafter called a petition for certification) may be filed by an employee or group of employees or an individual or labor organization acting in their behalf or by an employer. A petition under paragraph (1) (A) (ii) of section

9(c) of the act, alleging that the individual or labor organization which has been certified or is being currently recognized as the bargaining representative is no longer such representative (hereinafter called a petition for decertification), may be filed by any employee or group of employees or any individual or labor organization acting in their behalf. Petitions under this section shall be in writing and signed, and shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgements or shall contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. An original and four copies of the petition shall be filed. Except as provided in

section 102.72, such petitions shall be filed with the regional director for the region wherein the bargaining unit exists, or, if the bargaining unit exists in two or more regions, with the regional director for any of such regions. Prior to the transfer of the case to the Board, pursuant to section 102.67, the petition may be withdrawn only with the consent of the regional director with whom such petition was filed. After the transfer of the case to the Board, the petition may be withdrawn only with the consent of the Board. Whenever the regional director or the Board, as the case may be, approves the withdrawal of any petition, the case shall be closed.

(b) Petition for clarification of bargaining unit or petition for amendment of certification under section 9(b) of the act; who may file; where to file; withdrawal. -- A petition for clarification

of an existing bargaining unit or petition for amendment of certification, in the absence of a question concerning representation, may be filed by a labor organization or by an employer. Where applicable the same procedures set forth in paragraph (a) of this section shall be followed.

Sec. 102.63 Investigation of petition by regional director; notice of hearing; service of notice; withdrawal of notice.

(a) After a petition has been filed under Sec. 102.61(a), (b) or (c), if no agreement such as that provided in Sec. 102.62 is entered into and if it appears to the regional director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the act will be effectuated, and that an election will reflect the free choice of employees in the

appropriate unit, the regional director shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein. A copy of the petition shall be amended or withdrawn before the close of the hearing by the regional director on his own motion.

(b) After a petition has been filed under Sec. 102.61(d) or (e), the regional director shall conduct an investigation and, as appropriate, he may issue a decision without a hearing; or prepare and cause to be served upon the parties and upon any known individuals or labor organization purporting to act as representatives of any employees directly affected by such investigation, a notice of

hearing before a hearing officer at a time and place fixed therein; or take other appropriate action. If a notice of hearing is served, it shall be accompanied by a copy of the petition. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director of his own motion. All hearing and posthearing procedure under this subsection (b) shall be in conformance with Secs. 102.64 through 102.68 whenever applicable, except where the unit or certification involved arises out of an agreement as provided in Sec. 102.62(a), the regional director's action shall be final, and the provisions for review of regional director's decisions by the Board shall not apply. Dismissals of petitions without a nearing shall not be governed by Sec. 102.71. The regional director's dismissal shall be by decision, and a

request for review therefrom may be obtained under Sec. 102.67, except where an agreement under Sec.102.62(a) is involved.

Sec. 102.64 Conduct of hearing. -- (a) Hearings shall be conducted by a hearing officer and shall be open to the public unless otherwise ordered by the hearing officer. At any time, a hearing officer may be substituted for the hearing officer previously presiding. It shall be the duty of the hearing officer to inquire fully into all matters in issue and necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under section 9(c) of the act.

(b) The hearing officer may, in his discretion, continue the hearing from day to day, or adjourn it to a later date or to a different place, by announcement thereof

at the hearing or by other appropriate notice.

NATIONAL LABOR RELATIONS BOARD:
Delegation of Authority to
Regional Directors

Pursuant to section 3(b) of the National Labor Relations Act, as amended, and subject to the amendments to the Board's Statements of Procedure, Series 8, and to its Rules and Regulations, Series 8, effective May 15, 1981) and subject to such further amendments and instructions as may be issued by the Board from time to time, the Board delegates to its Regional Directors "its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under

subsection (c) or (e) of section 9 and certify the results thereof".

Such delegation shall be effective with respect to any petition filed under subsection (c) or (e) of section 9 of the Act on May 15, 1961.

NATIONAL LABOR RELATIONS BOARD
CASEHANDLING MANUAL (PART TWO)
REPRESENTATION PROCEEDINGS

11302.1 Selection of Election Dates:

The date selected should be one which balances the desires of the parties and operational considerations, along with the desirability of facilitating employee participation and prompt and timely conduct of election. Where there is a choice, dates on which all or part of the plant will be closed, on which past experiences indicates that the rate of absenteeism will be high, and on which many persons will be away from the plant on company business or

on vacation should be avoided; so should days immediately preceding or following holidays.

An election may not be held sooner than 10 days after the Regional Director has received the list of names and addresses of the eligible voters. Where the parties jointly wish a prompt election, presumably the employer will make the list available in less than 7 days. If the parties are pressing for an early election, the 10-day period can be provisionally calculated from the date it is estimated the list will arrive in the Regional Office.

To avoid a situation where the list is promised early to secure a prompt election, but submission is delayed, the notice of election should not be mailed until the list is in hand. However, an election may be held on the ninth day provided that day is the day before a holiday, a weekend, or

a shutdown, and further provided that all parties agree. In the event of a bona fide strike or picketing situation in which all parties desire a prompt election, and the employer has furnished the list promptly, an exception may be made to the 10-day period depending upon the facts of the case.

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM MAY 14, 1979

TO: All Regional Directors

FROM: John S. Irving, General Counsel

SUBJECT: Performance Appraisal System for Regional Directors
- Critical Elements of Regional Director Positions
- Performance Standards for Each Critical Element

As you know, the Senior Executive Service will become operational on July 13, 1979. Regional Director positions have been designated as SES career reserve positions and each of you have been given the opportunity to enter the SES. Prior to July 13, the Agency must develop a performance appraisal system pursuant to which senior executives will be evaluated annually.

The Regional Directors Conference was structured to provide Regional Directors with the opportunity to fully understand

SES and participate in the establishment of an appraisal system for Regional Directors. Thereafter, discussions were held with the Regional Directors' Committee in Washington to fully consider the views of the Directors with regard to the critical elements of the position and the performance standards for measuring each of the critical elements. As a result of these discussions, which were both constructive and mutually beneficial, we have developed a performance appraisal system which accommodates many of the concerns of the Directors, as well as our concern for the development of performance standards which would permit a fair and equitable evaluation of job performance in accordance with the requirements of the Civil Service Reform Act. Before implementation of the appraisal review system for Directors, the system must be

submitted to and approved by the Office of Personnel Management.

I wish to repeat certain assurances which have been given to the Directors and the Regional Directors' Committee in order to allay the concerns about elements of the appraisal system which require reliance upon agency statistics. We are working closely with the Data Systems Branch and the Statistical Services Staff to ensure the timeliness and accuracy of all statistics used in the evaluation process. In this regard, we will develop guidelines which will be promulgated pior to July 1 to ensure that all Regions are following the same instructions with respect to casehandling matters of a judicial nature which have an impact on statistics and to ensure that the Regions are otherwise submitting statistical data in uniform manner. In order to ensure that the data

submission and the computation of statistics are accurate, the most careful attention to supervision of these functions must be given in Washington and the Regions.

CRITICAL ELEMENTS OF REGIONAL DIRECTOR POSITION TOGETHER WITH THE FACTORS COMPRISING EACH CRITICAL ELEMENT (100 points maximum, plus 14 bonus points) 1/

1/ Bonus points are allocated to each of the five major critical elements. Bonus points will be awarded based upon exceptional and/or improved performance in these critical areas as well as extenuating circumstances. Illustrative factors of extenuating circumstances that may be considered in awarding bonus points are the following: serious travel problems; Sub-offices; Regional Office understaffed; handling of exceptionally time consuming case(s); large number of priority cases; exceptionally inclement weather (snow, etc.); exceptionally inexperienced professional staff; highly significant improvement in overall performance; exceptionally large numbers of supervisors and Regional Management used for Agency training purposes; excessive number of foreign-speaking persons involved in case(s); and size of Regional Office staff.

EFFECTIVENESS AND EFFICIENCY OF PERFORMANCE

(30 points maximum, plus 5 bonus points) 2/

Settlement Agreements

Election Agreements

Regional Director Decisions

(pre-election)

Post Election Proceedings

Elections

Complaints

Percentage of 45-day coverage cases

within control

Percentage of unexcused coverage

compliance cases

Priority Cases

2/ The five bonus points allocated to this critical element may be awarded as described in footnote one, above, provided that a maximum of two points can be used to award exceptionally timely performance; and provided further that not more than one point may be used to award exceptionally timely performance in any single category.

QUALITY OF CASEHANDLING (25 points maximum, plus 3 bonus points)

A. Litigation results with appropriate consideration for merit factor and settlement rates

B. Quality review of R and C closed case files

C. Review of the quality of casehandling documents issued by the Region or submitted to Washington

D. Conformity with Agency casehandling regulations, policies and procedures

E. Reversal of decisions of the Regional Director

ACHIEVEMENT OF AGENCY PROGRAMS AND OBJECTIVES, SUCH AS: (20 points maximum, plus 3 bonus points)

A. Maintainance and fostering good relations with public

B. Conformance with Agency personnel

and administrative regulations and policies

C. Appropriate utilization of region's staff and fiscal resources

D. Support of other programs, such as:
Officer-of-the-Day Program
Cooperative Education Program
Interregional cooperation

STAFF RELATIONS INCLUDING DEVELOPMENT AND TRAINING OF SUBORDINATES (25 points maximum, plus 3 bonus points)

A. Staff Relations

1. EEO: Administers the National plan in an effective, appropriate and timely manner Develops and implements the Regional plan in an effective, appropriate and timely manner

2. Labor Relations: Administers the National Agreement in an effective, appropriate and

timely manner

3. Sound overall staff relations programs

B. Development and Training of Subordinates

1. Development and implementation of local training programs for employee and supervisory staffs in accordance with established Agency guidelines

2. Timely and accurately appraises subordinates in conformity with Agency guidelines

3. Counsels members of supervisory and managerial staff; and inspires participation and support of managerial and supervisory development programs

STANDARDS FOR EVALUATING PERFORMANCE IN CRITICAL ELEMENTS

EFFECTIVENESS AND EFFICIENCY OF PERFORMANCE: (30 points, plus 5 bonus points)

Settlement Agreements (6 points)

Percent of Merit	
85 - 100	6
80 - 84	5
75 - 79	4
70 - 74	2
0 - 69	0

Election Agreements (4 points)

80 - 100	4
75 - 79	3
70 - 74	2
65 - 69	1
0 - 64	0

Regional Director Decisions (pre-election) (3 points)

Median Days	
0 - 35	3
46 - 49	2

50 - 52	1
53 -	0

Post Election Procedings (3 points 3/)

0 - 35	3
36 - 40	2
41 - 44	1
45 -	0

Elections (3 points) 4/

Median Days

0 - 45	3
46 - 50	2
51 -	0

3/ This factor evaluates hearing and non-hearing cases. In hearing cases it includes: Hearing Officer reports in Stipulation for Certification cases, supplemental decisions in directed cases, and decisions in consent cases. In non-hearing cases it includes: Reports in Stipulation for Certification cases, supplemental decisions in directed cases, and decisions in consent cases.

4/ The standards of performance are from filing of petition to conduct of election.

Complaints (3 points)

0 - 45	3
46 - 49	2
50 - 55	1
56 -	0

Percentage of 45-day Cases Within Control (3 points)

0 - 2	3
2.1 - 3	2
3.1 - 4	1
4.1 -	0

Percentage of Unexcused Overage Compliance Cases Within Control 5/ (3 points)

0 - 3	3
3.1 - 8	2
8.1 - 13	1
13.1 -	0

5/ This factor evaluates the timeliness of compliance in cases in which a Board Order or Court Decision has issued.

Priority Cases Involving: (2 points)

Overall assessment of R.O. priority casehandling performance in accordance with GC Memorandum 77-9.

QUALITY OF CASEHANDLING (25 points, plus 3 bonus points)

Assessment will be based on:

A. Litigation Results with appropriate consideration for merit factor and settlement rates.

B. Quality Review of R and C closed case files to include:

1. Review will include at least the cases listed below, of which a significant number will be non-merit cases:

15 CA cases) Review recently closed cases-
10 CB cases) withdrawals, dismissals not
5 priority cases) appealed and informal settlements/adjustments

10 R case files including some

cases in which RD Decisions or Reports on Objections and Challenges have issued.

2. The appropriateness of actions taken in the case including the correctness of ultimate decision.
3. The completeness of the investigation.
4. Whether the file is self-contained.
5. Conformity with law, Agency regulations, policies and procedures.
6. Review recent withdrawals to determine conformance with G.C. - O.D. program, extent of investigation beyond initial affidavit and interval between filing and approval of withdrawal.

Any deficiencies noted will be promptly communicated to the Director so that corrective action can be taken during the appraisal period. The Director will not be penalized for deficiencies that are corrected prior to the follow-up review.

C. A review of the quality of casehandling documents issued by the Region or submitted to Washington to include:

1. Submissions to Advice and Appeals.
2. Recommendations for enforcement, miscellaneous litigation, and contempt, including the adequacy of compliance efforts.
3. Formal Settlement Stipulations.
4. Regional Director Decisions.
5. Quality of pleadings, including complaints and complaint analyses contained in transmittal memoranda.
6. Reports on Objections and Challenges.

D. Conformity with Agency casehandling regulations, policies and procedures.

E. Reversal of decisions of the Regional Director. 6/

1. Reversals on appeals of C cases

2. Reversals of pre-election RD Decisions or dismissals of R cases (based on other than change in policy).

3. Reversals of RD Decisions (objections/challenges) based on other than change in policy.

ACHIEVEMENT OF AGENCY OBJECTIVES (20 points, plus 3 bonus points)

Assessment will be based on:

A. Maintainance and fostering of good relations with the public: Conduct of or participation in

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6/ The Quality of the decision as well as the percentage of reversals will be considered.

educational and Labor-Management Relations meetings to include at least one regionally sponsored conference with representatives of management and labor; and take the initiative to maintain successful relations with the Bar and the public.

B. Conformance with Agency personnel and administrative regulations and policies.

C. Appropriate utilization of Region's staff and fiscal resources. The Director will be evaluated on the extent to which any deficiency is corrected.

D. Support of other Agency Programs: Regional support and implementation of Agency programs, including General Counsel's special emphasis programs such as: the Cooperative

Education Programs, the Officer of the Day Program, the Inter-Regional Cooperation Programs. The Director will be evaluated on the extent to which the programs are carried out.

STAFF RELATIONS INCLUDING DEVELOPMENT AND TRAINING OF SUBORDINATES (25 points, plus 3 bonus points)

A. Staff Relations

1. EEO

The Regions should implement the National Plan and develop and implement the Local Plan in an effective, appropriate and timely manner.

2. Labor Relations

Administers National Agreement in an effective, appropriate and timely manner.

3. Sound Overall Program of Staff Relations.

B. Development and Training of Subordinates.

Assessment will be based on:

1. Development and implementation of local training programs for employee and supervisory staff in accordance with established Agency guidelines.
2. Timely and accurately appraises subordinates in conformity with Agency guidelines, including supervisors and managers.
3. Counsels members of the supervisory and managerial staff; and insures participation and support to managerial and supervisory development programs.

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM APRIL 13, 1982

TO: All Regional Directors

FROM: William A. Lubbers, General Counsel

SUBJECT: Performance Factors for Critical Element 1 for Appraisal Period January 1, 1982 through December 31, 1982

After consultations with the Regional Directors' Committee, we have established the performance factors under Critical Element I for the current SES appraisal period. The standard for Settlement Agreements has been raised from 82 to 84 percent, and the standard for Post-Election Proceedings in which hearings are held has been changed from 90 to 95 median days.

The remaining performance factors in Critical Element I were not modified. For your convenience, the Critical Element I factors for the current appraisal period are set forth below.

Settlement Agreements: the assessment will be based upon the Region's success in achieving an 84 percent settlement rate.

Election Agreements: the assessment will be based upon the Region's success in achieving an 80 percent election agreement rate.

Regional Director Decisions (pre-election): the assessment will be based upon the Region's success in issuing its Regional Director Decisions within a median of 45 days from the filing of the petitions.

Post-Election Proceedings (hearings): the assessment will be based upon the Region's success in issuing its Reports, Decisions and Supplemental Decisions in post-election proceedings within a median of 95 days from the filing of the objections/challenges.

Post-Election Proceedings (nonhearing):

the assessment will be based upon the Region's success in issuing its Reports, Decisions and Supplemental Decisions in post-election proceedings within a median of 35 days from the filing of the objections/challenges.

Elections: the assessment will be based upon the Region's success in conducting elections within a median of 50 days from the filing of the petitions.

Complaints: the assessment will be based upon the Region's success in issuing its complaints within a median of 45 days from the filing of the charges.

Percentage of 45-Day Cases Within Control: the assessment will be based upon the Region's success in implementing 98 percent of its determinations within 45 days of the filing of the charges.

Percentage of Unexcused Overage Compliance Cases Within Control: the

assessment will be based upon the Region's success in closing 95 percent of its compliance cases within 80 days of its receipt of the Board Order or Court Decision.

Priority Cases: the assessment will be based upon an overall analysis of priority casehandling performance in accordance with General Counsel Memorandum 77-9.

We believe that the revisions noted above will enable the Agency to appropriately recognize and reward its Directors. If you have any questions concerning this memorandum, please contact your Assistant General Counsel.

W. A. L.

MEMORANDUM 2/13/81

TO: William A. Lubbers
General Counsel

FROM: John H. Fanning, Chairman

SUBJECT: Modification of SES Appraisal System for RD's

The Board has approved the subject modifications set forth in your memo of January 28, 1981.

Problems may lurk in the use of national averages as a norm of performance in certain areas. For example, some areas of the country are more contentious or litigious than others, thus hampering the ability of one or more regions to meet or surpass the national average. However, a judicious application of the heightened flexibility incorporated into the system should alleviate that. In this connection, we do not read the illustrations of the "extenuating circumstances" (fn 1) to be assessed as exhausting all extenuating

circumstances.

It appears anomalous to promulgate new standards after the rating period covered by those standards has begun. But inasmuch as the new system has been developed in coordination with Directors, they presumably will have no objections and, to some extent, have bee operating with due regard for the possibility of modification.

Finally, meeting national averages should not automatically result in the highest possible reward of points. There should be some incentive - short of the bonus point approach - to surpass national averages and an appropriate evaluation technique should be developed to achnowledge the fact that achieving an 82.6 percent settlement rate is excellent, but no so excellent as achieving a higher one.

J.H.F.

cc: The Board

N.L.R.B. PERFORMANCE REVIEW BOARD
EVALUATION OF BERNARD LEVINE,
REGIONAL DIRECTOR

Bernard Levine - Regional Director, Cleveland, Ohio. Overall . . . achievement of 94.4 rate of settlements and adjustments is among highest of all regions . . . 29 day median for issuance of RD Decisions is best in nation;. . . 33-day median for processing post-election proceedings compared favorably with natinal median of 42 days.

Effectiveness and Efficiency of Operations...exceeded national average in settlement agreements by 12 points and election agreements and had no overage 45-day cases nor overage compliance cases ... succeeded in conducting elections within a median of 45.6 days which is better than national average ... excellence in all areas of endeavor; Quality of Casehandling ... Region achieved success in whole or in part in 70% of litigated cases

... conducted adequate research as well as demonstrating fine legal analysis ... improvement in quality of investigation; Achievement of Agency Programs and Objectives ... very successful in conducting labor law seminar with Cleveland Bar Association ... excellent public relations program ... highly supportive of Agency progrmas like recruitment of field examiners, attorneys and coop students ... substantial involvement in implementing formats for CHIPS; Staff Relations Including the Development and Training of Subordinates ... effective and timely implementation of national EEO program ... has significantly exceeded its EEO goal in some areas and met it in most other areas ... conducts an effective training program ... Region's investigative outline has served as a training model for rest of agency.

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 8-RC-12700
8-RC-12710

In the Matter of: CANTON HEALTH CARE CENTER
and
UNITED FOOD & COMMERCIAL
WORKERS UNION
LOCAL 698, AFL-CIO & CLC

Pages: 1-60

Place: Canton, Ohio

Date: July 28, 1982

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which was consolidated with Canton Health Care for hearing, case number 8-RC-12710, the parties entered into a prehearing stipulation.

Also, let the record reflect that the Employer is not willing to enter into the prehearing stipulations and has informed the Hearing Officer in fact that it will not stipulate to any matters in this proceeding based on its contention that the Regional Director has not constitutional authority to direct an election in this matter.

MR. CARMODY: If I may add a brief word to that, the refusal to enter into those stipulations which I identified certainly concerns the conversations that we had prior to the opening of the record, and your statement to me that you did not intend to permit the Employer to raise that

issue in this proceeding.

HEARING OFFICER TEMSEY: Well, I will permit you to raise the issue regarding the issue that you wanted to raise, but I am not really going to litigate it. I can't litigate that. I am not a constitutional attorney and I have no basis on which to litigate it. This is not the proceeding to litigate such a question.

MR. CARMODY: As I explained, the Employer is prepared to do so.

[TRANSCRIPT PAGE 7]

HEARING OFFICER TEMSEY: You are in the wrong place as I told you before. If you want to litigate such a question, you will do it some place else, you can do it in another manner.

I indicated that you could make a motion to dismiss the petition based on that and I probably have not authority to dismiss it myself, but you can refer it to

the Director. But, as I said, it is something that you should have made before coming to the hearing and had a ruling on it.

But, that is something they can rule on easily.

But, as I said, I am more concerned about getting the stipulations with regard to the rest of the issues, if possible.

First, we want to cover commerce. Would the company please state its full and correct name for the record?

MR. CARMODY: Mr. Hearing Officer, this seems to be the appropriate place to raise the issue which the Employer is going to raise in this proceeding and state the Employer's position on the petition.

It is the position of the Employer that

[TRANSCRIPT PAGE 8]

the Regional Director is unable to constitutionally process the petition and

direct an election -- conduct an election in light of the fact that upon information and belief that the Regional Director is a participant in the Senior Executive Services.

I suppose it would make sense at this time to settle the question of whether or not the Employer will be allowed an opportunity to develop a record on that issue which we raised in this proceeding. If you are not going to permit me to do that, then, I will respond accrdingly.

HEARING OFFICER TEMSEY: Let me ask you what kind of record you are talking about?

MR. CARMODY: A full and complete record on the operations of the Senior Executive Services and the constitutionality.

HEARING OFFICER TEMSEY: You want to develop the record on the operations of the Senior Executive Services, is that it?

MR. CARMODY: On the issue I have raised as to the constitutionality of the Regional Director processing a petition directing an election and holding an election, inasmuch as he is a participant.

HEARING OFFICER TEMSEY: Has that been found by someone to be a basis for questioning the authority of the Regional Director, you must have some reason?

[TRANSCRIPT PAGE 9]

MR. CARMODY: I am raising an issue.

HEARING OFFICER TEMSEY: It has never been raised before. Have you raised it before?

MR. CARMODY: Oh, I have raised it before, yes.

At this time, I would submit to you an application for three subpoena duces tecums in connection in deveoping a record on the issue.

I would like to have those marked for

identification, if I can, as Employer's Exhibit No. 1.

HEARING OFFICER TEMSEY: What would the purpose of the subpoenas be?

MR. CARMODY: To develop a record on the operations of the Senior Executive Services with reference to the processing of this petition.

HEARING OFFICER TEMSEY: You can't get that information using our subpoenas. Who did you intend to subpoena?

MR. CARMODY I don't believe under the rules and regulations of the Board I need identify that at this time.

HEARING OFFICER TEMSEY: Well, let me put it this way, this is all in relation to that question that I'm not going to litigate here -- I won't let you litigate?

[TRANSCRIPT PAGE 10]

MR. CARMODY: May I have that marked for identification?

HEARING OFFICER TEMSEY: You can have the subpoenas if you want the subpoenas. We are not going to litigate anything here.

You don't know what you are going to do with the subpoenas?

MR. CARMODY: Mr. Hearing Officer, if I may, I would like to make a motion at this point under 102.64a of the Board's Regulations for a continuance of the hearing to be allowed an opportunity to serve the subpoenas.

HEARING OFFICER TEMSEY: So that you can develop the record regarding the issue that you're talking about, the constitutionality?

MR. CARMODY: Yes.

HEARING OFFICER TEMSEY: No, I am not going to grant that motion for that reason because I have already stated that I don't believe that issue is one that can be litigated in this proceeding, and

threrefore, I will not allow the hearing to be postponed for that reason.

[TRANSCRIPT PAGE 11]

MR. CARMODY: I would note that I am in receipt of the subpoenas at this point and I have the right to serve the subpoenas.

HEARING OFFICER TEMSEY: Let me ask you how long it would take for you to serve the subpoenas and why you didn't ask for them before this proceeding?

MR. CARMODY: I don't believe there is any obligation under the rule and regulations of the Board to ask for subpoenas in advance of the hearing. As a matter of fact, the rules specifically provide for written application at the hearing.

As to how long it would take me to serve them, I suppose that could be done today or tomorrow, as quickly as it can be mechanically done.

HEARING OFFICER TEMSEY: Who would you be serving?

MR. CARMODY: I am not absolutely certain at this point. I don't believe that the rules and regulations require me to identify at this stage of the proceeding who I intend to serve the subpoenas to.

HEARING OFFICER TEMSEY: And when would you propose that the hearing be postponed to?

MR. CARMODY: I would propose next Tuesday.

[TRANSCRIPT PAGE 12]

HEARING OFFICER TEMSEY: No, based on what you are seeking to pursue, as I stated, no, we will not postpone the hearing, we are going ahead today.

MR. CARMODY: Maybe I should repeat my statement on our position on this thing.

HEARING OFFICER TEMSEY: How long a statement do you have?

MR. CARMODY: A matter of just a few minutes. I do have two more documents that I would like to have marked for identification here.

HEARING OFFICER TEMSEY: All right.

MR. CARMODY: Will you mark these as Employer's Exhibits 1, 2, 3 and 4?

(The documents referred to were marked for identification as Employer's Exhibits 1, 2, 3 and 4.)

MR. CARMODY: I would like the record to reflect that a cititation to the statute that I'm making reference to, and the findings of the Senior Executive Service is located at 5 U.S. Section 5381 et. seq.

To paraphrase the Employer's position on the constitutional question, the Employer claims a denial of due process under the Fifth Amendment of the United States Constitution by virtue upon information and belief of the Regional Director's participation in the Senior

Executive Service.

[TRANSCRIPT PAGE 13]

It is the Employer's position that it is a scheme which injects the administration of the Act, a pecuniary interest on the part of the Regional Director which affects his decision making or could affect his decision making in the processing of this petition. And under prevailing law, that is a deprivation of the due process.

HEARING OFFICER TEMSEY: Let me ask you, are you making, Mr. Carmody, a motion to dismiss this petition at this time?

MR. CARMODY: I have not made that motion yet, I merely asked for an opportunity to develop the issue. I do intend to make that motion.

HEARING OFFICER TEMSEY: Why don't you make it now?

MR. CARMODY: In light of the fact that

you are refusing to permit me to litigate that issue, I would at this point move in accordance with 102.65(a) of the rules and regulation of the Board that this case be transferred to the Board.

HEARING OFFICER TEMSEY: Transferred to the Board but you are not making a motion to dismiss?

[TRANSCRIPT PAGE 14]

MR. CARMODY: I am making a motion that the case be transferred to the Board at this time.

HEARING OFFICER TEMSEY: On that motion, I think that that motion has to be considered by the Regional Director for his ruling, and I can't rule on that motion.

MR. CARMODY: I would at this time move under 102.65(a) of the Board's rules and regulations that the petition be dismissed on the basis of the Regional Director's inability to constitutionally process the

petition.

HEARING OFFICER TEMSEY: That motion is also referred to the Regional Director for his consideration and ruling.

Let's go on with the rest of it, and I don't know how we are going to proceed.

We need to know the correct name of the Employer.

MR. CARMODY: I have one other point. As I understand it, you intend to continue on with the hearing inasmuch as we are not going to be granted a continuance?

I assume at some point in this hearing that the record will close today and at that point it would be appropriate to consider any request for filing of a brief. At this time, I would like to state

[TRANSCRIPT PAGE 15]

that the Employer requests that we have an opportunity to file a brief, and under 102.67(a) of the Board's rules and

regulations, I ask the Hearing Officer for the 14 days.

HEARING OFFICER TEMSEY: You could ask for it at that time and I will rule on it at that time, but I won't rule on it right now.

MR. CARMODY: At this point, inasmuch as we are being denied the opportunity to litigate the issue that I raised, the employer does not intend to participate in the hearing any further.

Can we go off the record?

HEARING OFFICER TEMSEY: Off the record.

(Discussion off the record.)

Supreme Court, U.S.
FILED
NOV 18 1985
CLERK

No. 85-379

In the Supreme Court of the United States

OCTOBER TERM, 1985

OHIO NEW AND REBUILT PARTS, INC., ET AL.,
PETITIONERS
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board's performance appraisal and compensation system for Regional Directors, promulgated under the Senior Executive Service provisions of the Civil Service Reform Act of 1978, creates an unconstitutional risk of bias in the Board's administrative process by including the timeliness with which cases are processed among a number of factors to be considered in evaluating a Regional Director's performance.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 760 F.2d 1443. The decisions of the National Labor Relations Board (Pet. App. 36-63, 64-84, 85-101) are reported at 267 N.L.R.B. 420, 269 N.L.R.B. 289, and 268 N.L.R.B. 613.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1985. The petition for a writ of certiorari was filed on July 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Civil Service Reform Act of 1978, 5 U.S.C. (& Supp. II) 1101 *et seq.*, are set forth at Pet. App. 102-135.

STATEMENT

The National Labor Relations Board found that petitioners Canton Health Care Center, Inc., and Colonial Gardens Care Center, Inc., violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with unions that had been certified as representatives in appropriate bargaining units following Board-conducted elections. The Board also found that petitioner Ohio New and Rebuilt Parts, Inc., violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by discharging and suspending employees and coercively interrogating and threatening employees during a representation campaign. Based on the serious and pervasive nature of the unfair labor practices found and the union's card majority, the Board issued a bargaining order. Petitioners do not directly challenge either the findings or legal conclusions underlying the Board's orders. Petitioners challenge the orders solely on the ground that the Board's performance appraisal and compensation system for Regional Directors, promulgated under the Senior Executive Service provisions of the Civil Service Reform Act of 1978, 5 U.S.C. (& Supp. II) 1101 *et seq.*, creates an unconstitutional risk of bias in the Board's administrative process by including the timeliness with which cases are processed among a number of factors to be considered in the evaluation of a Regional Director's performance.

1. a. In Title IV of the Civil Service Reform Act of 1978, 5 U.S.C. (& Supp. II) 3131 *et seq.*, Congress created the Senior Executive Service (SES) and included therein most of the top executive positions in the federal service in order to develop "the most highly motivated and highly competent Federal Service leadership possible" (S. Rep. 95-969, 95th Cong., 2d Sess. 67 (1978)).[1] The central feature of

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[1]SES positions are defined in 5 U.S.C. 3132 as those senior executive positions not required to be filled by a presidential appointment in

the SES program is a comprehensive performance appraisal system and a compensation program of monetary awards based on merit that may be added to the executive's base salary (see 5 U.S.C. (& Supp. II) 3131, 5384). Among the statutory purposes of the SES performance appraisal system are to "encourage excellence in performance by senior executives" and to "permit the accurate evaluation of performance in any position on the basis of criteria which are related to the position and which specify the critical elements of the position" (5 U.S.C. 4312(a)(3) and (1)). In 5 U.S.C. 4313, Congress mandated that appraisals take into account factors such as: (1) improvements in efficiency, productivity, and quality of work, including significant reductions in paperwork; (2) cost efficiency; (3) timeliness of performance; (4) meeting affirmative action goals and equal employment opportunity requirements; and (5) indications of the effectiveness, productivity, and performance of employees for whom the executive is responsible.

The statutory scheme requires each federal agency, subject to the approval of the Office of Personnel Management (OPM), to designate those positions that are to be SES positions and to design an appropriate performance appraisal system for such positions (5 U.S.C. (& Supp. II) 3133, 4312-4314). The agency must provide an annual summary rating of an executive's performance, and the rating system is required to include one or more "fully successful" levels, a "minimally satisfactory" level, and an "unsatisfactory" level

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which an employee: (1) directs the work of an organizational unit; (2) is responsible for the success of one or more programs or projects; (3) maintains progress toward organizational goals and periodically evaluates and makes adjustments in the pursuit of such goals; (4) supervises the work of employees other than assistants; or (5) otherwise exercises important policy-making or executive functions. Generally, SES positions are those executive positions in the federal salary structure above the rank of GS-15 on the General Schedule and below Level IV of the Executive Schedule (see 5 U.S.C. (& Supp. II) 5382).

(5 U.S.C. 4314(a)). An executive who receives a fully successful rating may be eligible for a performance award of up to 20% of his base salary, but no more than 50% of the SES executives in any agency may receive a performance award in a given year (5 U.S.C. (& Supp. II) 5384(b)(2), (3)). An executive who receives an unsatisfactory rating must be transferred or reassigned; in certain cases of unsatisfactory performance, he must be removed from the SES program altogether (5 U.S.C. 4314(b)(3), (4)).

b. Pursuant to 5 U.S.C. 3133, the Board has designated the position of Regional Director as a "career reserved" SES position (Pet. App. 187).[2] Under the direction of the Board's General Counsel, Regional Directors supervise a staff of attorneys and field examiners in the processing of representation and unfair labor practice cases. Regional Directors are empowered to issue and prosecute complaints in unfair labor practice cases and to obtain settlement in such cases. They are also authorized to direct and conduct elections in representation cases, including certification of results, to investigate and report on or decide election objections and challenged ballots, and to issue certifications of bargaining representatives. In addition, Regional Directors are authorized to obtain compliance with Board and court decisions, and they are responsible for the administrative management of their offices. See National Labor Relations Board Organization and Functions, Section 203.1, 32 Fed. Reg. 9588, 9589 (1967).

In accordance with the statutory provisions governing the Senior Executive Service, the Board developed an

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[2]"Career reserved" positions are those SES positions required to be filled by a career appointee (5 U.S.C. 3132(a)(4)). The statute provides that "a position shall be designated as a career reserved position only if the filling of the position by a career appointee is necessary to ensure impartiality, or the public's confidence in the impartiality, of the Government" (5 U.S.C. 3132(b)(1)).

appraisal system for Regional Directors that was approved by OPM.[3] Under the Board's appraisal plan Regional Directors are rated at one of four overall levels ranging from "highly successful" to "unsatisfactory." The overall appraisal is determined from numerical ratings in each of four "critical elements": (1) effectiveness and efficiency of performance; (2) quality of casehandling; (3) achievement of agency objectives; and (4) staff relations, including development and training of subordinates (Pet. App. 26-34). The ratings under each element in turn depend on the extent to which a Regional Director achieves certain specified goals. Performance under each of the critical elements is of equal importance in the overall evaluation (*id.* at 26).

Under critical element I—effectiveness and efficiency of performance—a Regional Director is evaluated on how well he attains certain time targets, expressed as a median number of days, in the performance of various responsibilities such as issuing a complaint in unfair labor practice cases, conducting elections, and issuing decisions that may be required at various stages in representation proceedings. Critical element I also sets out percentage goals for the achievement of settlement agreements in unfair labor practice cases and agreements concerning the conduct of elections in representation cases. Pet. App. 29-31, 34-35.[4] The

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[3]The Board's initial appraisal system for Regional Directors was promulgated in May 1979 (see Pet. App. 187-204). The system was modified in February 1981 (*id.* at 209-210) and modified again in minor respects in April 1982 (*id.* at 205-208). At all times relevant here, the system in effect was as set forth in the 1981 and 1982 modifications (see *id.* at 26-35).

[4]The standards under critical element I generally predate the establishment of the SES and most have been part of the Board's administrative policy since 1959. See Supplemental Appendix Filed By The Board in the Court of Appeals 41-46; see also DeSio & Higgins, *The Management and Control of Case Handling, Office of the General Counsel, NLRB,* 2 The Bureaucrat 385, 389-390 (1974).

determination of a Regional Director's success in satisfying the specific performance factors under critical element I includes consideration of any extenuating circumstances that may affect meeting the various targets.[5] Thus, the numerical rating under critical element I represents a judgment about the Regional Director's achievement of time targets in light of the total circumstances in which the Region is required to perform. A Regional Director is not guaranteed a specific number of points by the achievement of any particular targets.

Under critical element II—quality of casehandling—regional office files are reviewed to determine the completeness of investigations, to determine whether actions taken in cases are in "conformity with law, Agency regulations, policies, and procedures," and to assess the quality of the legal documents (such as settlement stipulations, pleadings, and complaints) issued by a Region (Pet. App. 31-32). The quality of a Regional Director's legal decisions in both unfair labor practice and representation cases, and the extent to which those decisions are reversed on appeal to the Board, are also considered (*id.* at 32). Under critical element III—meeting agency objectives—Regional Directors are assessed on their performance in maintaining good relations with the public, conforming to the Board's administrative policies and regulations, using staff appropriately,

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[5]Extenuating circumstances that are considered include the following (Pet. App. 29 n.1):

> [S]erious travel problems; Suboffices; Regional Office understaffed; handling of exceptionally time-consuming case(s); large number of priority cases; exceptionally inclement weather (snow, etc.); exceptionally inexperienced professional staff; highly significant improvement in overall performance; exceptionally large numbers of supervisors and Regional management used for Agency training purposes; excessive number of foreign-speaking persons involved in case(s); and size of Regional Office staff.

and supporting agency programs (Pet. App. 33). Finally, critical element IV assesses a Regional Director's performance in implementing the Board's equal employment opportunity plan, the collective bargaining agreement with Board employees, and the staff relations program, including training (Pet. App. 33-34).

Consistent with the statutory SES requirements, a Regional Director must achieve an overall rating of either "highly successful" or "fully successful" to be eligible for a performance award. A performance award is not, however, necessarily granted to a Regional Director who has achieved such a rating, and an award may be granted to a Regional Director who has attained fewer points than another eligible Regional Director who does not receive an award.

2. The Board, in entering orders in the instant cases, rejected petitioners' contention that the SES provisions as applied in the appraisal and compensation of Regional Directors create an unconstitutional risk that Regional Directors will be biased on issues that come before them because of the inclusion of efficiency of decisionmaking among the factors to be considered in the evaluation process (Pet. App. 36-63, 64-84, 85-101). The Board relied (Pet. App. 91-92 n.2) on its prior decision rejecting the identical challenge in *French Hospital Medical Center*, 254 N.L.R.B. 711 (1981). In *French Hospital* the Board noted (*id.* at 711 n.3):

> [A]ll the Regional Director[s'] rulings are subject to review by the Board, the members of which are not in the Senior Executive Service. Also, the rapidity with which representation cases are processed is but one of

many factors considered under the Senior Executive Service compensation plan.[6]

3. The court of appeals enforced the Board's orders (Pet. App. 1-17).[7] The court stated that petitioners' "claim that

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[6]While the proceedings before the Board were pending, petitioners Ohio New and Rebuilt Parts, Inc., and Canton Health Care Center, Inc., filed suit in the United States District Court for the District of Columbia seeking to enjoin the proceedings on the ground that the SES provisions, both on their face and as applied to Regional Directors, violate due process and equal protection. The court dismissed the suit, *Canton Health Care Center, Inc.* v. *United States,* No. 82-2511 (D.D.C. Oct. 31, 1983) (unpublished decision) (see Pet. App. 9-13), and the court of appeals affirmed without opinion, 750 F.2d 1093 (D.C. Cir. 1984).

The district court found that, insofar as petitioners sought to challenge the SES system on its face or as applied to federal employees other than Board employees, they lacked standing to do so because they "fail[ed] entirely to allege any injury * * * as a result of the government-wide implementation of the S.E.S. program" (see Pet. App. 10). With respect to petitioners' challenge to the program as applied to Regional Directors, the court held that petitioners were required to exhaust their administrative remedies before the Board but that, in any event, petitioners' "substantive challenge to the S.E.S. compensation scheme is patently without merit" (see Pet. App. 11). The court noted that "[t]he primary thrust of plaintiffs' complaint appears to be * * * that the financial interest which [a Regional Director] may have in the speed with which he processes [cases] results in a risk of bias 'for or against any issue presented' " (*ibid.*). The court found that, although "[j]udicial and administrative adjudicators may not, consistently with due process, have a financial interest in the matter which is the subject of * * * administrative proceedings[,] * * * an administrator does not have such interest merely because he may be motivated to resolve proceedings themselves expeditiously" (*ibid.* (footnote omitted)). Moreover, the court noted that "the speed at which matters are resolved is only one factor among several in the S.E.S. incentive awards system" (*id.* at 12). The court concluded that "it seems that due process guarantees would more likely be violated if administrators had no incentive to process matters efficiently and with an emphasis on quality than is true under the present scheme" (*ibid.*).

[7]The three cases were consolidated for appeal, and petitioners stipulated that they were not disputing the factual findings or legal

the first [critical] element tempts the Regional Director to dispose of matters with reckless speed in an effort to earn a 'performance award' * * * ignores the fact that the second, third and fourth critical elements" are given equal weight in the evaluation process (*id.* at 16). Moreover, the court found that petitioners' reliance on cases in which a quasi-judicial or judicial officer has a direct financial interest in the substantive outcome of his decisions was misplaced, because "[t]here is no showing that Regional Directors have any comparable possibility of a financial stake in their decisions" (*id.* at 15-16).

ARGUMENT

Petitioners contend (Pet. 24-52) that the SES provisions are unconstitutional as applied in the performance appraisal and compensation of the Board's Regional Directors because rewarding expedition in the processing of matters before the Board creates an unlawful risk of bias in the Board's decisionmaking process. This contention is plainly without merit and does not warrant review by this Court.

As the court of appeals noted (Pet. App. 15), there is "a strong and firm presumption that governmental officials [will] perform their functions without bias." See *Schweiker* v. *McClure,* 456 U.S. 188, 195 (1982); *Withrow* v. *Larkin,* 421 U.S. 35, 47 (1975); *United States* v. *Morgan,* 313 U.S. 409, 421 (1941). Petitioners have made no demonstration, either as a general matter or in the context of any of the three Board proceedings below, sufficient to overcome that presumption. First, even if we assume arguendo that Regional Directors are required to place an undue emphasis

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conclusions underlying the Board's orders, but rather were seeking only to challenge the constitutionality of the Board's SES appraisal system for Regional Directors (Pet. App. 2, 17).

on speed, it is not apparent why that emphasis impels them to any particular outcome, *i.e.*, results in *biased* decision-making. Second, and more important, there is no basis for petitioners' premise that the SES system leads to undue emphasis on expedition. The contention that a Regional Director might possibly be motivated by the time targets in critical element I to subvert the decisionmaking process or to reach a particular substantive outcome simply overlooks that a Regional Director is ultimately evaluated, not on his achievement of particular time targets, but rather on his overall performance in reaching fair and reasoned decisions that on their merits are consistent with the principles and policies of the National Labor Relations Act.[8]

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[8]As noted above, the time targets in critical element I serve only as goals, the achievement of which is to be considered in light of any extenuating circumstances. A Regional Director is not guaranteed a particular rating under that critical element by achieving or failing to achieve any particular time target. Moreover, the time targets themselves are expressed in terms of a median number of days in which certain actions should be taken, and therefore they do not require that a Regional Director meet a time deadline in any particular case.

Indeed, in each of the three cases involved here the Region took more time than the prescribed median in processing particular aspects of the case. For example, while critical element I provides that decisions required prior to elections should be made within a median of 45 days from the filing of a petition and that elections themselves should be conducted within a median of 50 days from filing (Pet. App. 35), the Region's Decision and Direction of Election in *Canton Health Care Center* did not issue until 99 days from filing of the petition, and the election itself was conducted 131 days from filing (C.A. App. A166-A169, A183). Similarly, an election in *Ohio New and Rebuilt Parts, Inc.*, was conducted 67 days after the petition was filed, and in *Colonial Gardens Care Center* the election was held 63 days from the filing of the petition (C.A. App. A73, A74, A97, A113). Thus, the circumstances of the very cases involved here belie petitioners' contention that the SES system induces a Regional Director to manipulate the processing of a case simply in order to meet a time target in critical element I.

Petitioners rely (Pet. 24-28) on decisions of this Court finding a violation of due process where judicial or administrative officers have either a direct financial interest or the possibility of such an interest in the substantive outcome of matters that come before them.[9] But those decisions do not indicate any constitutional problem where, as here, an administrator is motivated simply to resolve the proceedings themselves in a timely and efficient manner. The Board's concern that matters before it be resolved in a timely fashion and with an emphasis on quality is consistent with due process and furthers Congress's expressed judgment that employee rights under the Act be vindicated in expeditious fashion. See, *e.g.*, *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 477-479 (1964); *American Federation of Labor* v. *NLRB*, 308 U.S. 401, 409-410 & n.2 (1940). Indeed, more generally, it cannot be doubted that it is desirable that rewards for government officials, either monetary or in the form of promotions, be based on superior performance.[10] It cannot seriously be maintained that efficiency is not an important ingredient in assessing

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[9]See *Tumey* v. *Ohio*, 273 U.S. 510, 531 (1927) (mayor's salary was paid in part by fees and costs levied by him while acting in a judicial capacity); *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972) (fines and costs levied in a mayor's court accounted for a substantial portion of municipal revenues and mayor was responsible for village finances); *Gibson* v. *Berryhill*, 411 U.S. 564, 578-579 (1973) (where members of state board of optometry were all optometrists in private practice they were constitutionally disqualified from revoking licenses of a substantial number of their competitors since a reduction in the number of optometrists in the market "would possibly redound to the personal benefit of members of the Board").

[10]Although petitioners' contention here is limited to SES employees, it is not apparent why the principle they advocate would not apply to any decisionmaker whose performance rating was based in part on efficiency, even if he is outside the SES system—or even to a claim that a decisionmaker resolved a particular case with undue expedition (without regard to whether it could affect his performance rating).

performance and that a decisionmaker who allows cases to languish on his docket for years should be treated as doing his job as well as one who decides his cases expeditiously (see Pet. App. 12).[11]

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[11]Petitioners' contention (Pet. 52-59) that they were improperly denied an opportunity "to develop a factual record" on the constitutionality of the SES system in the *Canton Health Care Center* representation proceeding, and therefore that neither the Board nor the court of appeals could give proper consideration to their legal contentions, is without merit. Petitioners had adequate opportunity to raise their contentions in each of the Board proceedings and did so (see, *e.g.*, Pet. App. 91-92 n.2). The decision of the hearing officer in *Canton Health Care Center* (see Pet. App. 213, 227) not to take additional unspecified evidence in support of petitioners' constitutional claim, in a hearing the purpose of which was to settle certain issues precedent to conducting a representation election in an appropriate bargaining unit, was under the circumstances a reasonable one. The trier of fact has broad discretion to limit the scope of the proceedings and to deny the admission of marginally probative evidence where its admission would appear to be a waste of time and lead to undue delay. See Fed. R. Evid. 403; 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 403[06] (1985); *McCluney* v. *Joseph Schlitz Brewing Co.*, 728 F.2d 924, 928-929 (7th Cir. 1984) (evidence properly excluded where it would have consumed a great deal of time and had very slight probative value).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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